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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 452

JOSEPH SACHS, doing business as ATLANTIC LIQUOR WHOLESALERS,

Petitioner,

—against—

BROWN-FORMAN DISTILLERS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Joseph Sachs, doing business as Atlantic Liquor Wholesalers, hereinafter sometimes called plaintiff, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on June 29, 1956, affirming, on the opinion of the Court below, a judgment of the United States District Court for the Southern District of New York in favor of

respondent, hereinafter sometimes called defendant, and respectfully represents:

The Opinions of the Court Below

The opinion of the United States District Court is reported at 134 F. Supp. 9. It is appended hereto at pages 4 through 17 App. The Court of Appeals for the Second Circuit, in a per curiam opinion, affirmed on the opinion of the court below. It is not yet officially reported and is appended hereto at pages 18-19 App.

Jurisdiction

1. The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court, was dated and entered on June 29, 1956. It is appended hereto at pages 20-21 App.

2. The jurisdiction of this Court is invoked under 28 USC §1254(1).

The Questions Presented

As to the First Cause of Action

1. Is it lawful, under the Robinson-Patman Act, for a liquor distiller to charge the equivalent of $480,000 more to one purchaser of a commodity than to other purchasers thereof, and to justify such price discrimination on the ground that the liquor distiller gave a firm commitment to sell a substantial quantity

of the commodities to the purchaser against whom he discriminated?

2. Is it a discrimination in price, made unlawful under the Robinson-Patman Act, for a liquor distiller to require a purchaser to sell to him bulk whiskey regardless of whether there was a disparity between selling price and market value thereof, as a condition for selling its commodities to that purchaser, at its regular prices, when the liquor distiller sells commodities of like grade and quality to other purchasers without imposing any such requirement?

3. Where a seller generally sells commodities of like grade and quality to all purchasers at the same price, but discriminates in price against a few purchasers, is it a defense under the Robinson-Patman Act for the seller to establish that it has discriminated against certain purchasers even more than it has discriminated against the complaining plaintiff; or is it sufficient, under the Robinson-Patman Act, for a plaintiff to prove that the seller discriminated against him by charging him more than its regular price to most of its customers, who were competitors of plaintiff?

4. As a matter of law, is a written agreement which provides for the sale of case goods whiskey by a distiller to a wholesaler, and for the sale of bulk whiskey by a wholesaler to a distiller, and which contains no provision for severing the two sales, one inseparable contract or two separate and distinct contracts?

5. Was the standard established by the Court below for proof that a distiller overcharged a wholesaler

so unwarrantably high as to render proof of a Robinson-Patman Act violation impossible in the ordinary case?

6. As a matter of law, under the facts set forth below, is the agreement between the distiller and the individual wholesaler binding upon the individual wholesaler as of June, 1946 (when price controls were in effect), as a result of which the distiller claimed that its insistence on purchasing bulk whiskey from the wholesaler at maximum OPA prices as a condition precedent to the sale of bulk whiskey conferred no benefit on the distiller, a claim proved by the plaintiff to be unfounded, or as of July 1946 (when price controls were not in effect)?

In June, 1946, Brown-Forman Distillers Corporation, a liquor distiller, made an offer to Capitol Wine & Spirit Corp., a corporate liquor wholesaler, to sell the latter case goods whiskey commencing in July 1946, and for the purchase of bulk whiskey, no delivery date being specified. The offer contained a provision that any assignee thereof had to be satisfactory to the distiller. By reason of this provision, in July 1946, petitioner, an individual liquor wholesaler who succeeded to Capitol's rights under the agreement, advised the distiller that he would like to be the assignee of the corporate wholesaler, to which the distiller agreed in July 1946.

As to the Second Cause of Action

7. Should a court take judicial notice that sales by a liquor distiller to contiguous and nearby so-called "monopoly" states at prices less than those charged a wholesale liquor distributor in New York adversely affect the wholesale liquor distributor?

As to the Fourth Cause of Action

8. Did a liquor distiller violate §101(b) of the New York State Alcoholic Beverage Control Law (forbidding any discrimination in price between liquor wholesalers) by requiring a liquor wholesaler to sell bulk whiskey to it as a condition of the sale of case goods whiskey by it to the wholesaler, a requirement not exacted from any other liquor wholesaler, and not set forth in its schedule of prices to wholesalers, filed with the New York State Liquor Authority?

Statutes Involved

The statutes involved are Robinson-Patman Act (15 USC §13(a)); Clayton Anti-Trust Act (15 USC 15); and New York State Alcoholic Beverage Control Law, Sec. 101(b), McK. Consolidated Laws, Alcoholic Beverage Control Law, Sec. 101(b).

The pertinent portions of these statutes are appended hereto, starting on page 1 App.

Summary Statement of the Matters Involved

The facts as they appear from the opinion of the District Court (4 to 17 App.), or from the undisputed evidence, disclose the following:

As to the First Cause of Action

Petitioner, plaintiff below (a citizen of the State of New York) (Finding No. 1, 49a*), a wholesale liquor dealer (Finding No. 2, 49a), claims that respondent, defendant below (a Delaware corporation) (Finding No. 3, 49a) violated the Robinson-Patman Act (15 USC §13(a)) by discriminating unfairly in price against him (Opinion 36a, 4 App.). The discrimination in price took the form of a requirement by respondent, a distiller, not exacted by respondent from any other New York wholesale liquor dealer (Pltf. Ex. 7; 25, 134a) and (T. 56-58, 61, 62, 151, 301, 688; 70-73, 125, 126a), that petitioner sell bulk whiskey to respondent at approximately $100,000 which was $480,000 less than its fair market value (T. 119-124, 243-249, 278-283, 341, 242, 477-478; 77-80, 87-91, 94-96, 98, 87, 100-1a), as a condition of petitioner's obtaining case goods whiskey from respondent at the

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* Petitioner's appendix filed in the court below is numbered 1a to 158a, inclusive. Respondent's appendix below is numbered 1da to 104da inclusive. The Clerk of the Court of Appeals numbered petitioner's reply appendix below 105da, the opinion of the Court of Appeals 106 and 107da, and the judgment of the Court of Appeals 108 and 109da. References to said appendices are designated herein by the respective letters a, or da, as a suffix. The stenographic record of the testimony is referred to as T. in said appendices, and where references to such testimony appear herein the page of the testimony is prefixed by the letter T. Figures in parentheses refer to pagination by the Clerk of the District Court of the record filed in the Court of Appeals.

same price charged by it to all other wholesalers (T. 579, 587-588, 1171; 108, 121a; Defendant's Exhibit A, letter of June 13, 1946; 154a). 1200 barrels of bulk whiskey were sold by petitioner to respondent containing 59,750 original proof gallons (O. P. G.) at approximately $1.70 per O. P. G., when the fair market value was approximately $10. per O. P. G. (Pltf. Ex. 8; 27, 134a). The facts in greater detail are:

The petitioner was a wholesale liquor dealer doing business in the State of New York on a modest scale until July 1, 1946, when he acquired the assets of a large and theretofore successful wholesale liquor dealer (known as Capitol Wine & Spirit Corp., hereinafter referred to as "Capitol") (Opinion 37a, 5 App.) for the sum of approximately $3,000,000 (Pltf. Ex. 26, 44da).

Petitioner realized that once his assets and Capitol's were combined, he would need a line of nationally advertised case goods whiskey in order to operate successfully (Opinion 38a, 6 App.; T. 158; 85a). Petitioner's attempts to obtain such lines were unsuccessful until he approached the respondent, a large distiller with nationally advertised lines (T. 99-104, 158, 565-573, 621-632; 74-76, 85, 103-7, 112-120a). Respondent refused to sell any case goods whiskey to petitioner (T. 592; 110a) but stated that it would only make a deal with Capitol (T. 595; 110a) and only on condition that it sell the respondent bulk whiskey having a fair market value of approximately $580,000 for approximately $100,000 (T. 579, 587-588, 1171; 108, 121a; Deft. Ex. A, letter of June 13, 1946; 154a). At all times involved in this suit respondent was filing schedules of its prices to whole-

salers with the New York State Liquor Authority, as it was required to do by law (Sec. 101-b, Alcoholic Beverage Control Law), showing that it charged all New York wholesalers the same price for the same commodities (125, 133, 134, 135a; T. 61-62; 72a). As a matter of fact, respondent did sell to all other New York wholesalers the same commodities at the same prices, but without exacting from them a requirement similar to the requirement exacted from petitioner (T. 301, 56-58; 125, 70-1a).

During the month of June, 1946, price controls (generally referred to as OPA or Office of Price Administration Controls) were still in effect but for the first 25 days of July, 1946, price controls were not in effect and that 25-day period is sometimes called the hiatus period (Emergency Price Control Act of 1942, 56 Stat. 23 (1942) as amended; Act of June 30, 1945, 59 Stat. 306 (1945); Price Control Extension Act of 1946, 60 Stat. 664 (1946); 50 USC App. Sec. 901, et seq.).

On June 20, 1946, respondent signed a letter, addressed to, but not signed by, Capitol, whereby respondent agreed to purchase bulk whiskey from Capitol and made a firm commitment to sell case goods whiskey to Capitol. The letter specifically stated that it could not be assigned without the consent of the respondent (Pltf. Ex. 1, 127-129a).

By letter dated July 12, 1946, petitioner asked for respondent's consent to his becoming such assignee (Finding 28, 62a), which consent was granted in writing by the respondent by letter dated July 17, 1946 (Finding 29, 63a).

During the month of July, petitioner also performed certain other acts, evidencing his desire to be the assignee of the June 20th letter, such as placing orders with the respondent, which orders were not, however, accepted by the respondent until the letter of July 17, 1946 (T. 1101, 1106, 1107; 124a).

The June 20th letter, the terms of which first became binding on the petitioner on July 17, 1946, which was during the hiatus period, provided for the sale by petitioner, to respondent, of bulk whiskey at former OPA prices which amounted to approximately $100,000, which was about $480,000 less than its fair market value. It also contained a firm commitment for the sale of case goods whiskey by respondent, to petitioner, over a two and one-half year period, at the same prices paid for those commodities by similar wholesale liquor dealers.

In July 1946, during the hiatus period, petitioner sold the bulk whiskey to respondent at the price set forth in the letter dated June 20, 1946 (Finding 28, 63a) and thereafter respondent sold to petitioner its case goods whiskey at the same price as it sold such whiskey to other wholesale liquor dealers in New York State (25, 134a; T. 58, 151, 688; 71, 73, 126a) (but without exacting from them any additional requirement, such as exacted from petitioner) (T. 301, 56-58; 125, 70-1a) and (T. 587-588, 1171; 108, 121a).

The District Court, in its opinion, stated that it did not matter, in its view of the case,

> "whether the contract be deemed to have been made on June 20, 1946, when price controls were in effect, or in July, 1946, during the hiatus period."

Nevertheless, it made a finding (No. 31) (64a) (Opinion 9 App.) that the contract had been affirmed, ratified and adopted by petitioner as of June 20, 1946.

Though the respondent admitted that unless petitioner had sold it bulk whiskey it would not have sold the case goods whiskey to petitioner (T. 996, 998; 105da), the District Court took the view that the two portions of the June 20th letter were separable and held that the provision for the sale of the bulk whiskey was no part of the price of the sale of the case goods whiskey (Opinion 13 App.) and that even if the purchase of the bulk whiskey by the respondent might be considered as entering into the transaction at all, the petitioner was not discriminated against because he received a firm commitment from the respondent for the delivery of a substantial quantity of case goods, which commitment no other New York distributor had (Opinion 15 App.). It therefore dismissed the cause of action.

As to the Second Cause of Action

Petitioner claims that respondent violated the Robinson-Patman Act (15 USC §13(a)) by discriminating in price against him, as follows:

There are many states of the United States wherein the State itself buys liquor from national distillers and sells it to the consuming public. These states are known as the so-called "monopoly" states. It is conceded that the respondent sold the same case goods liquor which it sold to petitioner and the other wholesalers in the State of New York to the contiguous and nearby monopoly states of Pennsylvania and Ohio, at less than it charged the plaintiff and the other

wholesalers in the State of New York (exclusive of the bulk whiskey transaction referred to in the first cause of action) (Pltf. Exs. 49, 50; 151-3a). The Courts below refused to take judicial notice that such sales at lower prices to the monopoly states adversely affected the petitioner, and therefore dismissed the cause of action (Opinion 17 App.).

As to the Fourth Cause of Action

The New York State Alcoholic Beverage Control Law, §101(b)2(a) provides that distillers must sell to all wholesalers at equal prices, and the prices must be set forth in lists which the distillers file monthly with the New York State Liquor Authority pursuant to §101(b)3(a). Petitioner claims respondent violated this section. It is conceded that the respondent did not indicate in its filed schedules that it was requiring the petitioner to sell bulk whiskey to it as a condition to obtaining case goods whiskey (25, 133, 134, 135a; T. 61-62; 72a), a requirement not exacted from any other New York wholesale liquor dealer (Pltf. Ex. 40; 135a).

The court below disposed of this cause of action by its finding that the petitioner was not overcharged, and dismissed the cause of action.

Reasons Relied on for the Granting of the Writ

Petitioner believes that the writ should be granted for the following reasons:

As to the First Cause of Action

1. A question of far-reaching importance is presented by the decision of the Court of Appeals, affirm-

ing the District Court, as to whether it is lawful, under the Robinson-Patman Act, for a liquor distiller to discriminate in price to the extent of approximately $480,000, between different purchasers of commodities of like grade and quality, merely because the liquor distiller gives a firm commitment to sell a substantial quantity of the commodities to the purchaser against whom it discriminates. If such decision were permitted to stand, it would be virtually impossible to enforce the Robinson-Patman Act, since the way has now been pointed to a simple method of avoidance. This is an important question of federal law, which has not heretofore been, but should be settled by this Court.

In its opinion the District Court states (Opinion 15 App.) that since the plaintiff was the only distributor of defendant in New York City who had a firm commitment from the defendant for the delivery of substantial quantities of case goods for a fixed period, the plaintiff was not discriminated against even if the bulk whiskey purchased may be considered as entering into the transaction at all. At the outset it should be noted that the firm commitment was not an agreement to sell plaintiff case goods whiskey at a fixed price over a fixed period of time. In such a case both parties would have taken the risk of market fluctuations and it would not lie in plaintiff's mouth to complain that at the time of any given delivery the price paid was more than plaintiff's competitors paid. But the agreement in the instant case was to sell plaintiff at the prices prevailing at the time of delivery.

The letter of June 20, 1946 (Pltf. Ex. 1; 127-9a), expressly stated that the prices to be paid for the

case goods to be delivered were to be the "applicable maximum OPA ceiling prices to wholesalers" and the letter then continued as follows:

> "After the prices to be paid for the case goods are no longer subject to Government regulation, the prices to be paid for the case goods delivered thereafter shall be Brown-Forman's lowest f. o. b. prices to similar wholesalers in effect from time to time."

The provisions concerning future deliveries are "terms of sale" provisions in the truest sense. This Court had occasion to consider the question as to whether price discrimination could be effected through the medium of terms of sale.

> *Corn Products Ref. Co.* v. *Federal Trade Commission,* 324 U. S. 726; at 740.

The contention was made in the *Corn Products* case that there was price discrimination effected through the granting of options on more favorable terms, which redounded to the advantage of certain customers. Mr. Justice Stone then said:

> "Petitioners assert that the practices prohibited by §2(a)* are discriminations in price, and not in the terms and conditions of sale other than price. They rely on the fact that in the course of the progress of the Robinson-Patman Bill through Congress, the phrase 'terms of sale,' originally included in the prohibited discriminations, was stricken from the bill. But even if the contention be accepted, we cannot ignore the

* 15 USC 13(a).

> fact that the present discriminations in the terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed. *And the Conference Committee, in reporting on this elimination of the phrase 'terms of sale' from the bill, made it clear that §2(a) still applied to indirect as well as direct discriminations in price.* It said that with the elimination of the phrase 'terms of sale,' the act is inapplicable to 'terms of sale except as they amount in effect to the indirect discriminations in price within the meaning of the remainder of subsection (a).' H. Rep. No. 2951, 74th Cong. 2d Sess., p. 5." (Emphasis supplied.)

If, not withstanding the deletion from the Act of the phrase "terms of sale," a variation in terms of sale cannot be used as a device for favoring particular customers, then, by the same token, terms of sale cannot be used as a device for discriminating against customers.

It seems quite obvious that if the Court would permit variations in terms to form the basis for a justification for price discrimination, the intent of Congress in prohibiting price discrimination would soon be completely thwarted through a multiplicity of ostensible variations in terms of sale.

Furthermore the defendant, by its own unequivocal course of conduct, has previously interpreted the transaction in suit differently from its present interpretation.

Now the defendant claims that its prices to all wholesalers, including the plaintiff, during the period in suit were the same, but that it charged the plaintiff more because it gave him a firm commitment. However, in its postings filed with the State Liquor Authority, defendant never indicated (as it was required to do, §101(b), subd. 3, 4, Alcoholic Beverage Control Law, Pars. 24 and 25 of the complaint, 13-14a) that its prices were higher where it granted a firm commitment (T. 61-62; 72a).

These filings, made *ante litem motam,* clearly establish that defendant did not consider the granting of a firm commitment something which entitled it to charge higher prices for the same goods.

There is no provision whatever in the Robinson-Patman Act whereunder a distiller could lawfully collect from one wholesaler a higher price than from another for the same type of case goods or whereunder the distiller could collect an additional consideration for the wholesaler's privilege of buying goods at regular listed prices, whether the same be in the guise of a firm commitment, a long term sale or similar device.

We believe that to the extent this Court has had occasion to consider this point it has decided that discrimination through a variance in "terms of sale" is unlawful. However, we believe this Court should formally settle the point that a "firm commitment" cannot be used as a basis for price discrimination.

While our argument with respect to the first cause of action is based upon undisputed evidence, it is, of

course, clear that this Court is not bound by the lower court's findings in a situation such as the one in the case at bar where the evidence is practically all written. *United States* v. *United States Gypsum,* 333 U. S. 364, 395-6 (1948).

In addition, this Court has held that it will undertake to correct concurrent findings made by two courts below in the case of obvious error. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.,* 340 U. S. 147, at p. 153 (1950).

2. The District Court held that it did not matter whether the contract between petitioner and respondent was made in June or July 1946, although it found that it was ratified, affirmed and adopted as of June 1946. Assuming that it was made in July, then the judgment of the Court of Appeals affirming the District Court must be reversed, on the ground set forth in paragraph No. 1 above. But even assuming that the agreement was made as of June, we have another important question of federal law which has not been, but should be decided by this Court, as follows:

> "Is it discrimination in price, made unlawful under the Robinson-Patman Act, for a seller to require a purchaser to sell to it any item as a condition for selling its commodities to that purchaser, when the same condition is not imposed on other purchasers?"

Even if we assume, as the District Court held, that the agreement was made as of June, when price controls were in effect, and that each side was not entitled to ask more for its goods than the maximum OPA price which was asked, was the respondent entitled under the Robinson-Patman Act to require the

petitioner to sell it any bulk whiskey at all, as a condition to obtaining case goods liquor, when such requirement was not exacted from any other wholesale liquor dealer?

If this question is answered favorably to the respondent, then, too, the door would be opened for a patent evasion of the Robinson-Patman Act, since it would be a question of fact, in each case, as to what was the value of the additional consideration exacted.

We believe that this decision of the District Court, affirmed by the Court of Appeals, requires reversal of the judgment.

The defendant's efforts to establish the making of the contract between plaintiff and defendant in June are designed primarily to permit the argument that there was no price discrimination because in agreeing to sell the bulk whiskey at applicable ceilings, the plaintiff furnished nothing of value over and above the price of the case goods itself.

We submit that although the contract between the plaintiff and the defendant was not made until July, 1946, all the elements of price discrimination within the meaning and intent of the Robinson-Patman Act were present, even if the agreement had been made at a time when bulk whiskey ceilings were in effect.

In the first place, the defendant's argument is predicated on an assumption that is completely invalid, namely, that the bulk whiskey could not be sold legally as bulk whiskey during the period of effective price controls for more than ceiling for bulk as such, and that, therefore, automatically fixed its value. On its

face this argument is fallacious. If the Robinson-Patman Act is interpreted so that the seller can insist on something else being sold to him as the condition of making a sale of a particular item to a selected potential buyer, there is immediately opened up an avenue of evasion that would inject a serious question of fact into every Robinson-Patman violation.

The assumption that it would have been unlawful for Capitol to have sold its bulk whiskey for more than ceiling for bulk as such was demonstrated to be invalid, however, when it was established that it would not have been unlawful for an owner such as Capitol to have disposed of the 1200 barrels of bulk whiskey in the form of case goods and to have realized "substantially more per original proof gallon than realized upon a sale of bulk whiskey" (Finding 22(d), 58a). Mr. Zucker, a former OPA attorney, called as an expert by the plaintiff, testified to the fact that it would have been perfectly legal for the plaintiff, a licensed wholesale processor, to bottle these 1200 barrels of whiskey as a processor and then to have sold them as a wholesaler and to have realized both the processor's mark-up and the wholesaler's mark-up, which came to a total of more than $11.00 per original proof gallon (T. 532, 535; 101-2a).

The bulk could also have been sold as part of a corporate set-up to realize as much as $9.00 or more per original proof gallon, as both the defendant and the plaintiff did in other instances during the same period of time (T. 241-242; 86-7a).

There cannot be the slightest doubt that the 1200 barrels of whiskey owned by Capitol in June, 1946 had an economic value to the plaintiff and defendant

of six times the $1.65 to $1.72 per original proof gallon price which the defendant paid (Pltf. Ex. 8; 27, 134a). If the Court believes that the agreement between plaintiff and defendant was made in June, 1946, there was still an unlawful discrimination, whether it be characterized as "direct" or "indirect."

Section 13 (15 USC, Robinson-Patman Act), provides:

> "(a) It shall be unlawful for any person engaged in commerce in the course of such commerce *either directly or indirectly* to discriminate in price. . . ."

See *Corn Products Refining Co.* v. *Federal Trade Commission* (1945), 324 U. S. 726, 732.

3. Another question of general importance is presented by the decision of the Court of Appeals affirming the District Court as to whether, in a case where a seller generally sells commodities of like grade and quality to all purchasers at the same price but discriminates in price against a few purchasers, it is a defense under the Robinson-Patman Act for the seller to establish that it has discriminated against certain other purchasers even more than it has discriminated against the complaining plaintiff?

We believe that it is sufficient under the Robinson-Patman Act for a plaintiff to prove that the seller discriminated against him by charging him more than its prices to its regular customers, who were competitors of plaintiff. This important question of federal law has not heretofore been, but should be, settled by this Court.

The District Court held in its opinion (15 App.) and made a finding (No. 34-65a) that the plaintiff received "better not worse treatment", that he "received a far higher allotment or commitment of these case goods than any other wholesaler in the United States." Thus, it would appear that the District Court believed that if a seller gives a commitment to sell more case goods to one purchaser than to another he can then exact from the purchaser to whom he gives a larger commitment a greater price than he can exact from his other customers. This would alter the Robinson-Patman Act so that a purchaser could not complain that he was being discriminated against in price even if he paid a higher price than the seller's other customers provided he received a firm commitment for more goods than other purchasers received. This would point the way to virtual emasculation of the statute.

4. The District Court erred fundamentally, as a matter of law, when it decided that the letter dated June 20, 1946, which provided for the sale of case goods whiskey by the respondent to Capitol (not the petitioner) and for the sale of bulk whiskey by Capitol to the respondent, and which contained no provision for severing the two sales, was a separable contract.

This Court has held that where the courts below make a certain holding as a matter of law, based on certain facts, that that conclusion of law is reviewable by the Supreme Court. *Mahnich* v. *Southern Steamship Co.,* 321 U. S. 96, at pp. 98, 99 (1943).

This court will even review findings of fact in a proper case. *Baumgartner* v. *U. S.*, 322 U. S. 665 at 671 (1943).

This important question of federal law has not been but should be settled by this Court. If a contract such as the one in the case at bar is held to be separable, another method has been established for evasion of the Robinson-Patman Act.

The error of the District Court is found in its own analysis of the issue (Opinion 13 App.):

> "*Analysis of the June 20, 1946 agreement and of the entire record leads to the conviction that the provision for the sale of the bulk whiskey was no part of the price of the sale of the case goods.* The plaintiff had scarce aged bulk whiskey and the defendant had scarce nationally advertised case goods. Each had a product the other wanted. It may be acknowledged that plaintiff would not have sold his bulk whiskey unless he obtained the distributorship contract and the defendant's firm commitment to sell him case goods. *And it may also be acknowledged that had the plaintiff not undertaken to sell the bulk whiskey the defendant would have been unwilling to designate the plaintiff its distributor and to obligate itself to deliver the 120,006 cases of its branded whiskey. This unquestionably was a factor which impelled the defendant to contract with the plaintiff; it was perhaps a strong motive for the defendant's action, but it does not follow that the operation of this motive entered into the fixing of the price of the case goods. However potent as an influence on the defendant's course, in the contract itself the sale of the bulk and the sale of the case*

goods were independent of each other. Each stood entirely on its own footing and the terms of sale of the one form no part of the terms of the sale of the other. The purchases of the case goods were to be spread over a 2½ year period; the bulk whiskey was to be sold within a reasonable time." (Emphasis supplied.)

The legal frailty of defendant's position becomes manifest if we paraphrase the substance of the negotiations between the parties:

(1) Plaintiff sought to buy the defendant's admittedly scarce case goods whiskey.

(2) The defendant negotiated to obtain a higher price for this case goods whiskey than it was receiving from its other customers in New York City and elsewhere.

(3) The higher price was not to take the form of an additional dollar payment but was to take the form of a sale of bulk whiskey at less than its market price or true economic value (T. 242, 477-479, 588, 1171; 87, 100-1, 108, 121a).

(4) There was haggling over how much additional per case the plaintiff should pay (Deft. Ex. A; 154-5a).

(5) The plaintiff, in effect, said he could not afford to pay as high an overcharge as defendant initially demanded (Deft. Ex. A; 154-5a).

(6) A lesser overcharge was agreed upon (Letter June 20, 1946, Pltf. Ex. 1; 127-9a).

(7) The agreement contemplated that the "overcharge per case" was to be paid in its entirety in advance (Pltf. Ex. 1; 127-9a).

(8) Having agreed at defendant's insistence to pay the entire overcharge in advance, the least the plaintiff was entitled to was some evidence, binding on the defendant, that defendant would deliver the number of cases on which the overcharge had already been paid, and thus came into being the meaningless word "franchise". The "franchise" was no more nor less than written evidence of a firm commitment on the part of the defendant to deliver to plaintiff the case goods merchandise, on the basis of which the overcharge had already been prepaid (Pltf. Ex. 1; 127-9a).

(9) Defendant had no legal obligation to sell case goods to plaintiff even at its own regular wholesalers' listed prices, but having agreed to do so, it could not legally exact indirectly an overcharge which would have been unlawful if exacted by way of a blunt price differential on the case goods sold.

It seems perfectly clear that if "it may also be acknowledged that had the plaintiff not undertaken to sell the bulk whiskey the defendant would have been unwilling to designate the plaintiff its distributor and to obligate itself to deliver the 120,006 cases of its branded whiskey," then it follows that the provision for the sale of the bulk whiskey was a part of the price of the sale of the case goods.

The testimony above cited and the Court's opinion quoted above clearly show that the defendant refused to sell the plaintiff any of its case goods whiskey unless it received bulk whiskey in return (T. 587-588, 1171; 108, 121a). Defendant did not controvert the clear testimony, and it stands admitted, that it would not sell any case goods to plaintiff unless it received

his bulk in return. Defendant did not require that any other wholesaler in the New York area sell to it bulk whiskey as a condition of obtaining case goods liquor at its regular price listed with the SLA (T. 61-62, 301, 56-58; 72, 125, 70-1a). Clearly, the defendant required the plaintiff to sell bulk to it as a condition of obtaining case goods—a condition defendant did not impose upon any other New York wholesaler.

We do not understand what point the Trial Court attempts to make when it says that . . . "in the contract itself the sale of the bulk and the sale of the case goods were independent of each other" (Opinion 14 App.).

That would seem to have no significance whatsoever unless it appeared that the parties could comply with one part of the contract without complying with the other, but that does not appear anywhere and is contrary to fact and contrary to the written agreement. The contract, as eventually accepted July 17, 1946, provided for the sale of bulk by the plaintiff to defendant and the sale of case goods by defendant to plaintiff. It was one entire contract. Had the plaintiff refused to sell his bulk under said contract, the defendant would have been justified in refusing to sell its case goods under said contract. We hesitate to state these fundamental and elementary principles because they seem so obvious and are doing so merely for the purpose of pointing out the fallacies in the reasoning of the court below.

The Trial Court argues that (Opinion 15 App.): "Authority for the separability of the sale by the plaintiff of the bulk whiskey from the sale by de-

fendant of the case goods is found in *U. S.* v. *Henry Drew & Co.*, 6 Cir., 172 F. (2d) 555.

We respectfully submit that the *Drew* case does not support this proposition. The Court in the *Drew* case said in the course of its opinion (p. 556):

> "If the transaction concerning the warehouse receipts had taken place during the existence of the original Act, as amended, and before its expiration, there would have been a violation of the regulations affecting ceiling prices, relating to warehouse receipts; but, in the interim during which the Emergency Price Control Act was not operative, these transactions relating to warehouse receipts were lawful."

In the *Drew* case the District Court dismissed a complaint of the Administrator of the Office of Price Administration, filed against Henry Drew & Co., a corporation, for treble damages based on the excess charged for certain case goods whiskey over the legal maximum price. The facts were somewhat complicated but in essence Henry Drew & Company, during the hiatus period, bought from retailers, as a condition for selling them case goods whiskey, bulk whiskey at more than the OPA ceiling price that prevailed both prior and subsequent to the hiatus period for similar bulk whiskey, but at less than its fair value in July 1946. When the case goods whiskey was delivered after the re-imposition of controls on July 25, 1946, the retailers were charged the full OPA ceiling price. The Administrator attempted to establish that there was a violation, claiming that Drew's requirement of the sale of the bulk whiskey to it as less than its fair value was an added consideration paid

by the retail purchasers, which constituted an OPA violation. The Court rested its decision squarely on the fact that the *"transaction had been entered into in the interim during which the Emergency Price Control Act was not operative."* Were the Court to have reached a different conclusion in the *Drew* case, *i. e.* to have determined that the bulk whiskey and the case goods sales were "tied-in", it would have rendered unlawful conduct which was unquestionably lawful when done. Under those circumstances, the Court was obviously reluctant to give such a retroactive effect to the Price Control Extension Act of July 25, 1946 (60 Stat. 664).

The instant case, however, is not a case arising under the Emergency Price Control Act. It arises under the Robinson-Patman Act. The gravamen of this action is not an unlawful overcharge, lawful when made, but an unlawful price discrimination, unlawful when made and continuously so since the enactment of the Robinson-Patman Act in 1936. Hence, there is no question of retrospectivity or retroactivity involved here and the *Drew* case is plainly not in point.

The defendant never took the position in the lower court that the two transactions were unrelated. In point of fact, Daniel L. Street, the defendant's chief witness, the attorney who drew the agreements upon which the suit is based, and its present Executive Vice President, testified that the two transactions were related (T. 750, 995, 996, 998; 105da).

In its brief in the trial Court, the defendant took the position that the two transactions were related. At page 7 of said brief, it stated:

"FACTS—To avoid repetition, the Court is re-

spectfully referred to the proposed findings of fact submitted herewith.

Defendant's proposed finding of fact No. 36, read as follows:

> "36. Plaintiff would not have sold the 1200 barrels of aged bulk whiskey without getting the Brown-Forman distributorship contract and its commitment to sell him case goods (1002) . . ."

No witness on behalf of defendant testified that the transactions were unrelated, and no one controverted the testimony of plaintiff's witnesses that the defendant refused to sell the plaintiff any of its case goods whiskey unless it received bulk whiskey in return.

The very wording of the June 20, 1946 letter (Pltf. Ex. 1; 127-9a) which the lower Court stated (Opinion 11 App.) "because the charter by which their dealings were governed", is complete proof of the inseparability of the bulk whiskey and case goods transaction.

5. The standard established by the Court below for proof that a distiller overcharged a wholesaler, was so unwarrantably high as to render proof of a Robinson-Patman Act violation impossible in the ordinary case. Thus, the Court of Appeals has sanctioned such a departure from the accepted and usual course of judicial proceedings by a District Court as to call for an exercise of this Court's power of supervision. See, *Victor D. Gibson* v. *Lockheed Aircraft Service, Inc.*, appearing in Advance Reports of the Supreme Court, L. Ed. March 12, 1956, Vol. 100, No. 8 at p. 305 (1956), and *U. S. Gypsum Co.*, 333 U. S.

364 (1948). To support such a standard would amount to judicial repeal of the Robinson-Patman Act. It clearly appears from the Opinion and from the undisputed evidence, that the petitioner was overcharged by the requirement that he sell bulk whiskey at 20% of its value as a condition to his obtaining case goods liquor at regular prices.

What further proof should any Court require to hold the defendant guilty of a Robinson-Patman Act violation?

This Court granted certiorari in *Kiefer-Stewart Company* v. *Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1950) on the following ground (at p. 212):

> "Doubt as to the correctness of the decision on questions important in antitrust litigation prompted us to grant certiorari. 340 U. S. 863, post, 630, 71 S. Ct. 89."

and then it proceeded to establish a standard of proof sufficient to support a finding that a conspiracy proscribed by the anti-trust laws existed. It then reversed the judgment of the Court of Appeals. We believe that this Court should also fix standards in this case for the proper application of the statute. To engage in the type of legalistic argument in which the lower court engaged in deciding that the contract was separable, is so utterly unrealistic as to warrant reversal by this Court. No plaintiff could ever recover for a Robinson-Patman Act violation if more proof was needed than the undisputed evidence adduced in the case at bar.

6. As a matter of law, the agreement of June 20, 1946 became binding upon the petitioner only in July

1946. To hold otherwise is again an error similar to the one set forth in the paragraph above. The Opinion, the Findings of Fact by the Court and the undisputed evidence show that it was not until July 1946 that the petitioner adopted the terms of the letter of June 20, 1946. How can it be claimed, therefore, that petitioner was bound as of June 20, 1946?

The Trial Court's basic confusion in this respect was further evidenced by its lumping together of "ratification," "confirmation" and "adoption," as though the legal consequences flowing from each is identical. The learned Court below says (Opinion 9 App.):

> "I say this although I am of the view, and so find, that the letter agreement of June 20, 1946, although subject to the defense of the Statute of Frauds, and possibly other defenses, by Capitol, was fully ratified, affirmed and adopted by the plaintiff, as evidenced by various writings and memoranda signed by or on behalf of the plaintiff."

Ratification and affirmation can take place where one purporting to act as agent for another makes an agreement. Ratification or affirmation by the principal of the agent's actions relate back to the time of the agent's original act. Adoption, however, is an altogether, different concept. If two legally competent parties (Capitol and defendant) make a contract, and at a later date a third party (plaintiff) adopts that contract with the consent of the opposite party, the third party (plaintiff) is just as legally bound as though he ratified the act of an agent theretofore taken in his behalf but, and the distinction is basic to this phase of our argument, in the case of

adoption, the third party (plaintiff) becomes bound when he adopts the contract (July 1946) and there is no relation back to a date when one of the parties was not a party to the agreement (to June 1946), which was the only point we attempted to make.

Actually there is some question as to whether there was even an "adoption" of the contract in July 1946, for all the parties actually did in July 1946 was to use the terminology of the June 20th unsigned letter as the basis of the agreement then made between them, or as the Court says in its opinion (11 App.) "its (the June 20th letter) provisions became the charter by which their dealings were governed".

The Agreement Between Plaintiff and Defendant Resulted from a Novation in July 1946

The novation constitutes a new contract that was made in July 1946.

The letters that passed between the parties establish the following. The letter of June 20, 1946 (Pltf. Ex. 1; 127-9a) stated that:

> "Any assignee of your Company [Capitol] shall be a duly licensed liquor wholesaler and shall be satisfactory to us."

The letter of July 12, 1946 (Pltf. Ex. 3; 130-1a) said in part:

> "Pursuant to the last paragraph of your June 20, 1946 letter, please be good enough at your convenience to indicate to me in writing that you are satisfied with the assignment of the said contract to me, now doing business as Atlantic Liquor

> Wholesalers and operating under my own Federal and State licenses."

To these defendant replied by letter of July 17, 1946 (Pltf. Ex. 4; 131-2a), which read in part as follows:

> "Replying to your letter of July 12th, we are very pleased to agree with the transfer of our contract with Capitol Wine & Spirit Corporation to the Atlantic Liquor Wholesalers, with yourself as proprietor of this Company."

It is apparent from the foregoing that the defendant accepted the plaintiff as the party to perform the terms of the contract, which, it claims, was made with Capitol on June 20, 1946. There was a clear substitution of plaintiff's performance for Capitol's performance. Under these circumstances there was no mere assignment of a pre-existing contract. There was a definite novation.

2 Williston Contracts (rev. ed. 1936), 1206, §420.

This is more than a mere matter of semantics. A novation is "a substitution of a new contract for the old." *6 Williston Contracts,* §1865, page 5239.

Section 424 of the *Restatement of Contracts* defines a novation as follows:

> "A novation within the meaning of the restatement of this subject is a contract that
>
> (a) discharges immediately a previous contractual duty or a duty to make compensation, and
>
> (b) creates a new contractual duty, and

(c) includes as a party one who never owed the previous duty nor was entitled to its performance."

Section 428 of the *Restatement of Contracts* provides as follows:

"Where a third person contracts with a debtor to assume, as an immediate substitution for the debtor's duty, a duty to the creditor to render either the performance for which the debtor was previously bound, or some other performance, and the creditor agrees either with the debtor or with the third person to such substitution, there is a novation that discharges the original debtor and subjects the third person to a duty to the creditor."

Both §424 and §428 are in accord with the New York Law.

Schloss Bros. Co., Inc. v. *Bennett* (1932), 260 N. Y. 243.

Any attempt by the defendant to hold Capitol as a party to the original agreement (assuming it to have been made), once defendant's assent to accept plaintiff as a party was given on July 17, 1946, would have been ineffectual. As Professor Williston says (p. 5242):

"In a novation the new contract of itself effects a discharge."

The defendant provided, in effect, and envisaged the necessity for a future contract when it inserted in the June 20th letter the requirement that any assignee should be a party acceptable to it. The parties

themselves recognized the need for the novation, as evidenced by the exchange of correspondence between them (Pltf. Exs. 3, 4; 130-2a).

The foregoing conclusion is in no way adversely affected by the fact that the defendant never expected Capitol to perform the covenants set forth in the letter of June 20th (T. 887; 123a). The defendant saw fit to make what it asserts was a June, 1946 contract with Capitol. It may be that a future novation was envisaged but the contractual rights became effective when the contemplated novation took place and that was July 1946, when there were no price controls in effect. Certainly, there was no contract made with the plaintiff in June.

Even If a Valid Contract Had Been Made in June 1946, Plaintiff First Became Contractually Bound to the Defendant in July 1946, Whether said Contract Be Considered as Resulting from a Novation or an Assignment

Prior to July 17, 1946, neither party was bound to the other. Plaintiff was not bound to sell his bulk whiskey to the defendant at any time prior to July 17, 1946 because it was only on that date that the defendant accepted the plaintiff as a distributor pursuant to plaintiff's request to that effect, contained in his letter of July 12, 1946.

Defendant was not bound to plaintiff prior to July 17, 1946 because it had expressly reserved unto itself the right to veto any assignment under the letter of June 20, 1946. And it was not until July 17, 1946 that the defendant actually wrote to the plaintiff accepting the plaintiff as the other contracting party.

So far as the plaintiff was concerned, until July 17, 1946 he was in exactly the same position as though there had never been a letter addressed to Capitol dated June 20, 1946. Defendant's counsel conceded that plaintiff was not bound (T. 1235-1236; 126a). The damage which plaintiff sustained arose by reason of the obligation which came into being on July 17, 1946. It was on that date that plaintiff was overcharged and it was then that this cause of action arose.

The Letter of June 20, 1946 Was Not Effective as *Between Plaintiff and Defendant* as of June 20, 1946

When the Court found in Conclusion No. 2 (66a) that the agreement of June 20, 1946 was effective as between plaintiff and defendant as of June 20, 1946, it fell into fundamental error which can best be exemplified by the following:

Let us assume that A and B reduce to writing an agreement in June but neither signs it. In July, C says to D: "I will perform the undertakings set forth in that writing that A undertook to perform," and D says: "I will perform the undertakings set forth in that writing that B undertook to perform," and both C and D sign a writing to the foregoing effect. There is no doubt that a contract has come into being but not, however, between A and B, but between C and D, and not in June, but in July.

If Capitol had signed the memorandum agreeing to be bound by the June 20th letter the contract might have been said to have been made in June, 1946 but when Joseph Sachs agreed in July 1946 to perform the terms of the proposed agreement be-

tween defendant and Capitol dated June 20, 1946, there is no relation back to June because *Joseph Sachs was not a party to the original agreement* and the plaintiff's explicit proof in this connection affirmatively establishes that the defendant would not countenance or accept Joseph Sachs as a party to the alleged original agreement.

The agreement could come into being only when Joseph Sachs agreed to be bound. At the risk of repetition, the agreement in the instant case did not come into being even when Joseph Sachs on July 12 agreed to be bound because the defendant had reserved unto itself the right to approve an assignee and this the defendant did not do until July 17, 1946, when it finally accepted Joseph Sachs as the other contracting party to the case goods and bulk whiskey agreement.

On July 17, 1946 defendant accepted plaintiff's performance in lieu of Capitol's performance. One party's obligation was substituted for the proposed obligation of another. This was no mere assignment of a pre-existing contract. This was *"a substitution of a new contract for the old"* and hence a novation. *6 Williston Contracts,* §1865, p. 5239 (rev. ed. 1938).

As to the Second Cause of Action

7. The court below erred in failing to take judicial notice that sales by a liquor distiller to contiguous and nearby monopoly states at prices less than those charged a wholesale liquor distributor in New York adversely affected the wholesale liquor distributor.

This Court has held that it would have to be a "blind" court not to see what all others can see and

understand. *U. S.* v. *Rumely,* 345 U. S. 41, at p. 44 (1952). And thus it took judicial notice of certain current events, as it also did in *U. S.* v. *Reynolds,* 345 U. S. 1, at p. 10 (1952).

Not to take judicial notice that a purchaser buys wherever it is cheaper for him to buy, and that therefore sales by a liquor distiller to contiguous and nearby monopoly states at prices less than those charged a wholesale liquor distributor in New York adversely affected that liquor distiller, is to make a court a "blind" court, which this Court refuses to be.

Thus, the Court of Appeals has decided an important question of federal law in conflict with applicable decisions of this Court.

As to the Fourth Cause of Action

8. The court below decided an important question of state law in a way in conflict with applicable state law by deciding that a liquor distiller did not violate section 101(b) of the New York State Alcoholic Beverage Control Law (forbidding any discrimination in price between liquor wholesalers) when it required a liquor wholesaler to sell bulk whiskey to it as a condition of the sale of case goods whiskey by it to the wholesaler, a requirement not set forth in its schedule of prices to all wholesalers filed with the New York State Liquor Authority, and not exacted from any other liquor wholesaler.

It is perfectly apparent from the foregoing that the defendant discriminated against the plaintiff by requiring him to sell bulk whiskey to the defendant at less than its fair market value in order to obtain case

goods whiskey, a requirement not exacted from any other New York wholesalers, plaintiff's competitors. Such discrimination is made unlawful by Section 101b, subdivision 2(a) of the New York State Alcoholic Beverage Control Law. In addition, subdivision 3(a) of said Section 101b provides that it is unlawful to sell liquor in New York to a wholesaler unless a schedule of prices is filed with the New York State Liquor Authority. It is conceded that in its filed schedules, defendant did not indicate that it was charging the plaintiff more than it charged all other wholesalers nor did it even indicate that it was charging anything to the plaintiff other than its listed price, which did not show a requirement of the sale of bulk to it by any wholesaler.

The District Court found not only that the plaintiff had not been discriminated against but also stated that it was unnecessary to pass on the question whether the plaintiff as a private person, even if there had been a violation, was entitled to maintain an action, in the absence in the statute of any provision for civil sanctions (Opinion 17 App.). This holding by the Court is contrary to the rulings both of this Court and of the New York Court of Appeals.

In *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33 (1916), this Court held that it was a necessary corollary of the Safety Appliance Act that a railroad employee, injured by reason of the employing railroad's failure to measure up to the standard of conduct required by the statute, has a right of action against the employing railroad.

Similarly, the New York Court of Appeals, in *Filardo* v. *Foley Bros., Inc.*, 297 N. Y. 217 (1948),

reversed on other grounds, *Foley v. Filardo,* 336 U. S. 281, stated, at p. 222:

> "There can be little question that the statute was passed for the benefit and protection of the laborer and, in such a case, a party who has 'suffered from a disregard and violation of the duty (imposed by statute) has a cause of action for his damages against the one who has disregarded his duty,' even though the statute does not explicitly provide for such a remedy."

We submit that the plaintiff established a violation of Section 101b of the New York Alcoholic Beverage Control Law for which he is entitled to redress under the laws of the State of New York.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX

Statutes Involved

The applicable provisions of the Robinson-Patman Act, 15 USC §13(a), are as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * * provided further, That nothing contained in Sections * * * of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade * * *."

The applicable provisions of the Clayton Anti-Trust Act, 15 USC §15, are as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him

sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, §4, 38 Stat. 731."

The pertinent portions of the New York State Alcoholic Beverage Control Law, Section 101(b) (McK. Consolidated Laws, Alcoholic Beverage Control Law, Section 101(b)) are set forth below.

Chapter 478 of the Laws of the State of New York of 1934, as amended, entitled "Unlawful Discriminations Prohibited; Filing of Schedules; Schedule Listing Fund", provides in subdivision 2 thereof as follows:

"It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers (a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality, (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment."

The said §101(b) further provides in subdivision 3 thereof, as follows:

"(a) No brand of liquor or wine shall be sold within the state to a wholesaler or retailer unless

a schedule, as provided by this section, is filed with the liquor authority, and is then in effect.

(b) The schedule shall be in writing duly verified and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the bottle and case price to wholesalers, the bottle and case price to retailers, the number of bottles contained in each case, which prices shall be individual for each item, and not in 'combination' with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any.

(c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose. * * *"

Opinion of District Court

(1335)

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EDWARD WEINFELD, *D. J.*

Plaintiff, Joseph Sachs, a licensed liquor wholesaler, sold to the defendant, Brown-Forman Distillers Corporation, a distiller, 1,200 barrels of aged bulk whiskey for $100,259.49. He now seeks to recover three times the sum of $481,642.51 representing the difference between the sales price and $582,000, the claimed market value of the barrels of whiskey. The action is grounded upon an alleged violation by the defendant of the (1336) price discrimination provisions of the Robinson-Patman Act.[1] The same transaction is also the subject of a separate cause of action for single damages based upon an alleged violation of the Alcoholic Beverage Control Law of the State of New

[1] 15 U. S. C. §13(a).

York which, in substance, makes it unlawful to discriminate directly or indirectly in price between one wholesaler and another in the State of New York.[2]

At the threshold it is noted that at the time these parties entered into the transactions which give rise to the present suit, the plaintiff had scarce bulk whiskey and the defendant had scarce nationally advertised case goods. Each sold the desired commodity to the other. There is no claim that the price charged to the plaintiff for the case goods was different from that charged by the defendant for the same goods to any of its other wholesale distributors in the State of New York, who were the plaintiff's competitors. What plaintiff does charge, in substance, is that the defendant as a condition of the sale of the case goods to him required that he sell his scarce bulk whiskey below its fair market value and that the difference between the latter figure and the sales price allocated to the number of cases purchased by him represents an increased price per case over that charged to other of defendant's New York distributors and as such is a prohibited price discrimination.

The defendant contends that its purchase of the bulk whiskey was made at the then applicable maximum OPA prices,—the maximum price that plaintiff legally could charge. Other (1337) defenses are also advanced.

As against plaintiff's essential claim we consider the facts.

For a number of years prior to April, 1946, the plaintiff was engaged on a modest scale in the wholesale liquor business under the name of Atlantic Liquor

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[2] McK. Consol. Laws, Alcoholic Beverage Control Law, §101-b.2.(a).

Wholesalers. On April 3, 1946 he entered into a formal agreement for the purchase of the entire outstanding capital stock of Capitol Wine & Spirit Corp. (hereinafter called "Capitol"), a large and theretofore successful liquor wholesaler whose federal license had been annulled but which was then operating under successive extensions to permit an orderly liquidation of its inventory. The sale of "Capitol's" stock to plaintiff was made subject to the approval of both the New York State Liquor Authority and the Office of Price Administration. Among Capitol's assets were 4,150 barrels of aged bulk whiskey. Plaintiff in the negotiations leading to the consummation of the contract was represented by his brother who at one time practiced law and was then the head of two finance companies and generally experienced in legal, business and financial matters.

Plaintiff and his brother, convinced that a combined venture of Atlantic and Capitol required for its successful operation the distribution of nationally advertised brands of whiskey, undertook negotiations to secure such products. The defendant is a distiller of well-known and nationally advertised brands of (1338) whiskey, among them "Old Forester" bourbon and "King" blended whiskey. Accordingly plaintiff, even before the requisite approvals had been issued—and indeed even before the formal agreement for the purchase by him of Capitol's stock had been signed—initiated and thereafter conducted negotiations with the defendant to obtain defendant's aforementioned products. These negotiations had progressed so far that on June 20, 1946 a conference was held at the defendant's offices in Louisville, Kentucky between the plaintiff's representatives and the defendant's

representatives. Again acting principally for the plaintiff at this session was his brother.

At the June 20th conference an agreement was reached and embodied in a letter from the defendant addressed to Capitol. This agreement provided for the sale by Capitol to the defendant of 1,200 barrels of bulk whiskey at the applicable OPA maximum ceiling prices. Payment for this merchandise was to be made by the defendant against sight draft drawn on it with warehouse receipts attached.

The June 20, 1946 letter further committed the defendant to the delivery to Capitol over a period of two years and six months, beginning July, 1946 and ending December, 1948, of 120,006 cases of defendant's Old Forester and King at the applicable maximum OPA ceiling price to wholesalers during price control, and when no longer subject to government price regulation, at the defendant's lowest f.o.b. price to similar wholesalers in effect from time to time. Capitol was to have the right to distribute (1339) these case goods in the Metropolitan area of New York City and Newburgh, New York. The agreement was stated to enure to the benefit of, and be binding upon, the successors and assigns of the respective parties, provided however that any assignee of Capitol be a duly licensed liquor wholesaler and satisfactory to the defendant.

While formal approvals to the sale of the stock had not been issued at the time of the conference, plaintiff's representatives and Capitol's officers were aware that the respective governmental agencies had indicated consent to the sale and that the certificates of approval would be issued in due course.

On June 27th, just one week after the letter agreement of June 20th was delivered to plaintiff's brother,

the plaintiff, following the issuance of the requisite consents, became the sole stockholder of Capitol pursuant to the agreement of April 3, 1946. As of 12:01 a.m. July 1, 1946, pursuant to a plan of voluntary liquidation, all of Capitol's assets were distributed to the plaintiff as its sole stockholder, who thereby became the owner of the 4,150 barrels of bulk whiskey, which included the 1,200 to be sold to the defendant and referred to in the letter of June 20, 1946.

OPA controls expired at midnight on June 30, 1946[3] and no price control was in effect until July 25, 1946, when the Price Control Extension Act of 1946 became effective.[4] The twenty-five (1340) day period between is referred to as the hiatus period. On July 12, 1946 the plaintiff forwarded to the defendant warehouse receipts covering the entire 1,200 barrels of whiskey together with a sight draft at the June 20, 1946 OPA price totalling $100,257.49 which was accepted and paid by the defendant on July 15th—all in accordance with the terms of the June 20th letter.

As already noted, the June 20, 1946 letter was signed by the defendant but not by Capitol. However, on July 12, 1946 when plaintiff forwarded the warehouse receipts for the 1,200 barrels of whiskey together with the sight draft he advised the defendant it was "in accordance with the terms of your letter of agreement * * *" and further, that among Capitol's assets taken over by him was the "contract with your company, which I was very pleased to adopt" and requested the defendant pursuant to its letter of June 20, 1946 "to indicate * * * in writing that you are

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[3] Emergency Price Control Act of 1942, 56 Stat. 23 (1942), as amended, Act of June 30, 1945, 59 Stat. 306 (1945).

[4] 60 Stat. 664 (1946), 50 U. S. C. App. §901 et seq.

satisfied with the assignment of the said contract to me * * *". On July 17th the defendant formally consented to the transfer "of our contract with Capitol" to the plaintiff.

The plaintiff's claim in this suit stems from the June 20, 1946 agreement, although he contends that as to him there was no agreement until July 17, 1946 when a novation occurred. The basic claim, already noted, is that the bulk whiskey which was sold for $100,257.49 had a fair-market or "true economic" value of $582,-000 and that the difference was an overcharge or price dis- (1341) crimination practiced by the defendant in its sale to him of the case goods and a violation of the Robinson-Patman Act, entitling him to recover treble the amount which he claims to be the resultant damage.

In my view of the case, it is unimportant to the decision of the basic question presented whether the contract be deemed to have been made on June 20, 1946 when price controls were in effect or in July, 1946 during the hiatus period. I say this although I am of the view, and so find, that the letter agreement of June 20, 1946, although subject to the defense of the Statute of Frauds, and possibly other defenses, by Capitol, was fully ratified, affirmed and adopted by the plaintiff, as evidenced by various writings and memoranda signed by or on behalf of the plaintiff. This makes it unnecessary to explore the many and conflicting contentions of the parties dealing with the law of contracts and the applicability of the Statute of Frauds.

When we examine the transaction of June 20, 1946 in its setting it becomes crystal clear what the parties were trying to do. At that time it is true that Capitol,

not the plaintiff, nominally owned the bulk whiskey. Plaintiff, however, was on the verge of either owning or by stock ownership controlling this whiskey. In fact at the time of the conference the OPA had already informally indicated its consent to the sale of Capitol's stock to the plaintiff and on that very day the New York State Liquor Authority had issued its official approval. Not only were Capitol's stockholders (1342) firmly committed by contract to sell out to the plaintiff, but in view of Capitol's past difficulties with the government and the pending loss of its permit it is utterly unrealistic to believe that the defendant in addressing its letter of June 20, 1946 to Capitol ever contemplated making Capitol as the then owner its distributor. The plaintiff, acting through his brother, and the defendant were dealing in anticipation of the plaintiff soon acquiring 100% of Capitol's stock and thereby in effect becoming Capitol.

Though the June 20th letter was in terms addressed to Capitol, as the nominal legal owner of the whiskey, in fact it was plaintiff who was intended to assume it as soon as he was legally in a position to do so. That is why the letter was delivered to plaintiff's brother who later turned it over to the plaintiff. That, too, is why no one of Capitol's expiring management participated in the conference or signed or was asked to sign the agreement on behalf of Capitol. Neither plaintiff nor defendant expected Capitol as then constituted to have anything to do with the transaction.

The June 20, 1946 letter stated the terms under which the plaintiff and the defendant were to operate in a continuing business relationship. It established, as plaintiff and defendant intended it should, the basis of that relationship. When the plaintiff, with the de-

fendant's complete acquiescence and approval, confirmed and adopted the June 20, 1946 agreement, its provisions (1343) became the charter by which their dealings were governed. That both parties so regarded it is conclusively demonstrated by their continued performance in accordance with its terms. In the circumstances it is profitless to pursue any inquiry into Capitol's legal status in respect to the contract during the brief interval between June 20, 1946 and its clear and unequivocal adoption by the plaintiff and the entry of the parties on its performance.

Nor is it of great moment whether on the plaintiff's adoption of the contract it took effect as of June 20, 1946 or as of July 17, 1946. Plaintiff contends that even if a valid contract had been made in June, 1946, neither he nor the defendant was bound to the other prior to July 17 when the defendant, following plaintiff's request to the formal assignment of the contract to him, consented thereto. In a word, he contends that until July 17 he was free to sell or not to sell his bulk whiskey to defendant at any price or upon any terms. Plaintiff's insistence upon the latter date as the effective date of the contract seems to proceed upon the theory that during the hiatus period he was no longer bound by the OPA restrictions which expired on June 30th and therefore was not limited to the OPA prices prevailing in June and which had been specified in the June 20th letter. But this argument proves more than he contends for—and indeed it serves to emphasize the voluntary adoption and continued recognition of the June 20th letter as the agreement of the parties. Thus under this theory, since plaintiff was not bound prior to July 17th, he was free when controls were off to charge for his bulk whiskey

(1344) whatever the traffic would bear. And of course he was also free voluntarily to limit himself to the June OPA prices for his product if he chose to do so. The OPA price was a maximum and not a minimum price and the plaintiff, if not otherwise bound, was under no compulsion to get more than the June OPA maximum price for his bulk whiskey if it were to his advantage not to do so. Yet on July 12th he voluntarily delivered to the defendant the warehouse receipts for the 1,200 barrels at the June OPA maximum price as stipulated in the June 20, 1946 agreement and specified that it was in accordance with that agreement. He was under neither economic restraint nor compulsion when he, in the exercise of his business judgment, elected to adopt and abide by that agreement. During the hiatus period prices for bulk whiskey skyrocketed and if, as plaintiff contends, he was not bound until July 17th to sell to the defendant, he was at liberty until that date to sell in the open and uncontrolled market or otherwise dispose of his merchandise, but preferred the advantages of the distributorship of the defendant's products and its firm commitment to sell him case goods.

This brings us to the question whether the agreement imposed on the plaintiff a price discrimination prohibited by the Robinson-Patman Act. The applicable provisions of the Act read as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases (1345) involved in such discrimina-

tion are in commerce, where such commodities are sold for use, consumption, or resale * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * * provided further, That nothing contained in Sections * * * of this title shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade * * *."[5]

The plaintiff argues that although the price paid by him for the case goods was actually the same as that charged by the defendant to all its other New York wholesalers, he nevertheless paid more than they did because he had to sell his bulk whiskey for less than it was worth. In considering the question of whether there was a prohibited discrimination it will be assumed arguendo in plaintiff's favor that he was not, as the defendant insists, in pari delicto, and that the price at which he sold his bulk whiskey to the defendant was substantially less than that at which he would lawfully have sold it to others. For, if there was no adverse price discrimination that of itself is the end of the plaintiff's claim under the Robinson-Patman Act.

Analysis of the June 20, 1946 agreement and of the entire record leads to the conviction that the provi-

[5] 15 U. S. C. §13(a).

sion for the sale of the bulk whiskey was no part of the price of the sale of the case goods. The plaintiff had scarce aged bulk whiskey and the defendant had scarce nationally advertised case goods. Each had a product the other wanted. It may be acknowledged that plaintiff would not have sold his bulk whiskey unless he obtained (1346) the distributorship contract and the defendant's firm commitment to sell him case goods. And it may also be acknowledged that had the plaintiff not undertaken to sell the bulk whiskey the defendant would have been unwilling to designate the plaintiff its distributor and to obligate itself to deliver the 120,006 cases of its branded whiskey. This unquestionably was a factor which impelled the defendant to contract with the plaintiff; it was perhaps a strong motive for the defendant's action. But it does not follow that the operation of this motive entered into the fixing of the price of the case goods. However potent as an influence on the defendant's course, in the contract itself the sale of the bulk and the sale of the case goods were independent of each other. Each stood entirely on its own footing and the terms of sale of the one formed no part of the terms of sale of the other. The purchases of the case goods were to be spread over a two and a half year period; the bulk whiskey was to be sold within a reasonable time. Plaintiff sold his bulk whiskey to the defendant at the maximum legal price. The defendant also sold its case goods to the plaintiff at the maximum legal price then prevailing and on the same terms as it fixed for the sale of like goods to all its other New York wholesalers. If anything the plaintiff was given preferred and more favorable treatment during a period of short supply than that accorded by defendant to any of its

other distributors who were plaintiff's competitors. The plaintiff was the only distributor of defendant in New York City who had a firm commitment from the latter for the delivery of a specified and very substantial quantity of case goods for a fixed period. In the case of its other (1347) distributors in the New York area the defendant not only made no formal commitments for delivery of its nationally advertised brands but sold on an order to order basis. If the purchase of the bulk whiskey may be considered as entering into the transaction at all, there is no escape from the conclusion that the plaintiff received better not worse treatment—that he was favored and not discriminated against. There was no unlawful price discrimination which placed him at a competitive disadvantage or offended the provisions of the statute.

Authority for the separability of the sale by the plaintiff of the bulk whiskey from the sale by defendant of the case goods is found in *United States* v. *Henry Drew & Co.*, 6 Cir., 172 F. 2d 555.[6] Though the case dealt with an alleged violation of OPA ceiling prices and not with the Robinson-Patman Act, it passed on a situation very similar to that presented here. It too grew out of the July, 1946 liquor shortage. The case involved an arrangement between the defendant, a distributor, and a distiller under which extra case goods were alloted to the distributor based in part upon warehouse receipts for bulk whiskey sold by the distributor to the distiller. The distributor's loss in the sale of the warehouse receipts was passed on by it to its retail dealers through the device

[6] The reported per curiam opinion does not contain all the facts of the case; these were derived from the stipulation of facts contained in the record on appeal.

of sale and repurchase of the warehouse receipts. The distributor sold to the participating retailers at OPA prices portions of the extra case allotment received by him (1348) from the distiller. The court rejected the government contention that the loss so borne by the retailers was an increase to them of the price of the case goods. Thus the case holds that the sale of the warehouse receipts for the bulk whiskey was separable from the sale of the case goods.[7]

The determination that there was no discrimination forbidden by the Robinson-Patman Act disposes also of the plaintiff's further contention that the transaction was a "tie-in" sale in violation of the price control statutes. *United States* v. *Henry Drew & Co.*, supra, is decisive on this point.[8]

The plaintiff argues too that the defendant imposed on him a price discrimination prohibited by the New York Alcoholic Beverage Control Act, §101-b.2(a).[9] It does not appear that the discrimination so forbidden differs from that proscribed in the (1349) Robinson-Patman Act. It having been found that there was no price discrimination the plaintiff has failed to establish a violation of the New York statute. This

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[7] See also *Gaddy* v. *Silverman*, 71 SE 2d. 277, 86 Ga. App. 239.

[8] For an example of a typical "tie-in" transaction and one subject to condemnation see *Distilled Brands, Inc.* v. *Dunigan*, 2 Cir., 222 F. 2d 867. Cf. *M. Kraus & Bros., Inc.* v. *United States*, 327 U. S. 614, 616-617.

[9] "It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers (a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality." McK. Consol. Laws, Alcoholic Beverage Control Law, §101-b.2.(a).

makes it unnecessary to pass on the question discussed in the briefs whether if a violation had been shown, the plaintiff as a private person, in the absence in the statute of any provision for civil sanctions for violations, may maintain an action thereunder.

Plaintiff asserts an additional claim flowing from the defendant's sales of its products to the State Liquor Commissions of Pennsylvania and Ohio, so-called monopoly states. It is doubtful at best whether the Robinson-Patman Act applies at all to sales to Government agencies, state or federal. In any event, the plaintiff has offered no proof whatever that these sales in Ohio and Pennsylvania for which he was not licensed, effected him adversely. The court may not, as plaintiff urges, take judicial notice of the likelihood that these sales to nearby states must have injured him because ultimately consumers would purchase wherever it is cheaper to do so. It may not be amiss to point out that both the monopoly states Ohio and Pennsylvania wherein the sales were made which are the subject of plaintiff's claim are removed by many miles from the Metropolitan New York City area and Newburgh where plaintiff was granted a franchise for distribution of defendant's products.

(1350) Having utterly failed to establish either damage or the likelihod of damage from the sales to monopoly states the claim predicated thereon must also be dismissed.

Separate Findings of Fact and Conclusions of Law are filed herewith.

Dated: September 12, 1955.

EDWARD WEINFELD
United States District Judge

Opinion of United States Court of Appeals

(106da)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 358—OCTOBER TERM, 1955.

(Argued May 17, 18, 1956 Decided June 29, 1956.)

Docket No. 23936

JOSEPH SACHS, doing business as
ATLANTIC LIQUOR WHOLESALERS,
Plaintiff-Appellant,

—against—

BROWN-FORMAN DISTILLERS CORPORATION,
Defendant-Appellee.

Before:

MEDINA, LUMBARD and WATERMAN,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York. Edward Weinfeld, *Judge.*

Plaintiff, a liquor wholesaler, appeals from a judgment of the District Court dismissing his complaint based on alleged violations of the Robinson-Patman

Act, 15 U. S. C. §13(a), and the Alcoholic Beverage Control Law of the State of New York, §101-b, 2(a). Opinion below reported at 134 F. Supp. 9. Affirmed.

(107da)

KRAUSE, HIRSCH, LEVIN & HEILPERN, New York City (Sydney Krause and Charles Singer, New York City, of Counsel), *for plaintiff-appellant.*

WHITE & CASE, New York City (Thomas Kiernan and Ernest A. Fintel, New York City, of Counsel), *for defendant-appellee.*

PER CURIAM:

Affirmed on the opinion of Judge Weinfeld, reported at 134 F. Supp. 9.

Judgment of United States Court of Appeals

(108da)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of June one thousand nine hundred and fifty-six.

Present: HON. HAROLD R. MEDINA,
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

JOSEPH SACHS, doing business as
ATLANTIC LIQUOR WHOLESALERS,
Plaintiff-Appellant

v.

BROWN-FORMAN DISTILLERS CORPORATION
Defendant-Appellee

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for

the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs taxed in favor of the appellee.

A. DANIEL FUSARO
Clerk

Judgment of United States Court of Appeals

(109da)

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

JOSEPH SACHS, etc.,

v.

BROWN-FORMAN DISTILLERS CORPORATION

358

JUDGMENT

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

FILED JUN 29 1956

A. DANIEL FUSARO CLERK

OCT 2 2 1956

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 1956.

No. 452.

JOSEPH SACHS, doing business as ATLANTIC LIQUOR WHOLESALERS,

Petitioner,

against

BROWN-FORMAN DISTILLERS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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Of Counsel.

Dated: New York, N. Y.
October 19, 1956.

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1956.

No. 452.

JOSEPH SACHS, doing business as ATLANTIC LIQUOR WHOLESALERS,

Petitioner,

against

BROWN-FORMAN DISTILLERS CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION.

Statement of the Case.

After certain preliminary negotiations which were initiated by the Petitioner (hereinafter referred to as the "plaintiff") had taken place with the Respondent (hereinafter referred to as the "defendant") in the spring of 1946 (T. 1035, 20da; T. 1038-39, 20-21da; F. F. 14, 51a; D. Ex. A, 154a, F. F. 15, 52a*), the plaintiff's representatives and defendant's representatives met and reached an agreement on June 20, 1946 (T. 791-93, 9-11da; T. 597, 30da; F. F. 16,

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* References:
The stenographic transcript of the testimony—"(T.)"; the exhibits—"(P. Ex.)" or "(D. Ex.)"; plaintiff's Petition—"(Pet.)"; plaintiff's printed appendix in the Court of Appeals—"(a)"; defendant's printed appendix in the Court of Appeals—"(da)"; Judge Weinfeld's Opinion—"(Op. a)"; and Findings of Fact—"(F. F. a)."

54a; Op. 38a) while the Emergency Price Control Statutes* (2da) (herein referred to as "O. P. A.") were in effect (F. F. 22(a) and (c); 58a). The substance of said agreement was that plaintiff would sell 1200 barrels of scarce bulk whiskey, at its O. P. A. maximum ceiling price, to defendant and defendant agreed to appoint plaintiff as one of its wholesale distributors in the Metropolitan area of New York City and Newburgh, New York, beginning in July, 1946, and to sell to plaintiff over a period of nearly 2½ years 120,006 cases of defendant's scarce nationally advertised brands of straight and blended whiskies at the defendant's current prices to wholesalers in effect at the time of delivery.

This agreement, reached at the June 20, 1946 meeting between the parties hereto, was incorporated in a letter (P. Ex. 1, 127a) (hereinafter referred to as the "June 20th letter") signed by defendant and addressed to Capitol Wine & Spirit Corp., all of whose stock plaintiff had a firm contract to acquire (P. Ex. 26, 44-55da). Said June 20th letter was delivered to plaintiff's representatives who stated the letter was satisfactory (T. 797, T. 798, 13da) and who took the signed letter away from said meeting (T. 597, 30da; F. F. 17, 56a) and delivered it to plaintiff herein (T. 611, 112a). It was understood and agreed by the parties at the June 20th meeting that as soon as certain license formalities were complied with and plaintiff became the legal owner of the capital stock of Capitol Wine & Spirit Corp., the June 20th letter contract would be assigned to plaintiff and assumed and performed by him (T. 794, 11-12da; T. 841, 15da; T. 1047, 21da; T. 1049, 22da; T. 874, 16-17da; P. Ex. 1, 127a). Defendant's representative specifically told plaintiff's representatives at said June 20th meeting "that as long as Mr. Joseph Sachs [the plaintiff herein] was the

* 50 U. S. C. A. App. Sec. 901 *et seq.* See 1944 U. S. C. A. App. Bound Volume.

assignee of the contract, that would be satisfactory to Brown-Forman, and acceptable to us" (T. 794, 11-12da; T. 874, 16-17da; T. 1049, 22da; T. 1088, 24-25da; F. F. 19, 57a; Op. 41-42a).

Subsequently, and in early July, 1946, plaintiff, by various writings signed by him, or on his behalf, voluntarily adopted, ratified and confirmed the June 20, 1946 agreement and began performance thereof (F. F. 31, 32, 33, 64-65a).

The plaintiff, after having completely performed, without objection (Stipulation B of Facts, pars. 21-22, 4da; Concl. of Law 4, 67a), the bulk whiskey transaction and the case goods transaction in accordance with the June 20, 1946 letter agreement (except that he only purchased 40,002 cases out of the 120,006 cases he was entitled to purchase (F. F. 32, 65a)), filed this suit in December of 1948. Although the Second Amended Complaint contained six causes of action, only three, the First, Second and Fourth, were the subject of plaintiff's appeal in the Court of Appeals and are sought to be reviewed here.

In the First Cause of Action plaintiff claimed that when he delivered his warehouse receipts in July, 1946, during the 25 day hiatus period when O.P.A. ceiling prices had temporarily lapsed (F. F. 22(c), 58a), the market value or, as plaintiff claims (Pet. 22), the "true economic value" of his bulk whiskey was $480,000 more than the O.P.A. ceiling price therefor. Plaintiff claims in paragraph 15 of his complaint (7a) that defendant retained said sum as "additional consideration and sales price" of the case goods and that plaintiff was, therefore, discriminated against unlawfully under the Robinson-Patman Act because when defendant accepted delivery of plaintiff's warehouse receipts for the bulk whiskey it paid him, as agreed in the June 20th letter, the O.P.A. ceiling price. The lower courts found plaintiff had paid the same price for case goods as

his competitors (Op. 37a, F. F. 32, 65a), that plaintiff had not been discriminated against (Op. 46a), but had been preferred and received more favorable treatment in a period of short supply than his competitors (Op. 45a) and that there was not therefore a violation of the Robinson-Patman Act (Op. 44a; Concl. of Law 3, 67a).

From the foregoing it will be seen that the entire gist of plaintiff's First Cause of Action is the alleged $480,000 difference by which the alleged market value of his bulk whiskey in July 1946 exceeded its maximum O.P.A. ceiling price on June 20, 1946. (See also complaint, pars. 15, 16, 18, 6-7a, 8a.) Despite this, plaintiff attempts to raise by his "Questions Presented" 2 (Pet. 3, 16) an issue which he never pleaded in the First Cause of Action in his complaint and which is, therefore, not properly before this Court, viz.: "Is it a discrimination in price, * * * for a liquor distiller to require a purchaser to sell to him bulk whiskey *regardless of whether there was a disparity between selling price and market value thereof*, as a condition for selling its commodities to that purchaser * * *?" (Emphasis added) The same observation applies to "Questions Presented" 6 (Pet. 4).

Further attention to the questions which Petitioner attempts to present with respect not only to the First Cause of Action, but also concerning the Second and Fourth Causes of Action, will be given in the discussion which follows.

Preliminary Comment Concerning the Petition.

Petitioner states that the facts set forth in his Petition are based on the Opinion of the District Court or on "the undisputed evidence" (Pet. 6). Despite such statement, plaintiff has based:

(a) six of the eight "Questions Presented," viz., Questions 1, 2, 3, 5, 6 and 8 (Pet. 2-5);

(b) his "paraphrase" of "the substance of the negotiations between the parties" (Pet. 22-23), and

(c) much of the argument in his Petition,

on assumptions or conclusions not supported by facts proved at the trial or contained in the Findings of Fact or Opinion of Judge Weinfeld, as unanimously affirmed by the Court of Appeals. For example:

1. Throughout plaintiff's Petition it is stated, in one form or another, that plaintiff was "required" to sell his bulk whiskey to the defendant ("Questions Presented" 2, 6, 8; Pet. 3, 4, 5, 6, 8, 9, 11, 16-17, 24, 28, 36). The lower courts, on the basis of the testimony and the documentary evidence, found as facts that plaintiff "initiated and thereafter conducted the negotiations with the defendant" (Op. 38a); that he voluntarily adopted and continued to recognize (Op. 43a) the June 20, 1946 letter as "the agreement of the parties" (Op. 43a); that he "voluntarily delivered to the defendant" his warehouse receipts on July 12, 1946 (Op. 43a, 40a; F. F. 28, 63a); and that, "He was under neither economic restraint nor compulsion when he, in the exercise of his business judgment, elected to adopt and abide by that agreement." (Op. 43a). They also specifically found that plaintiff was not "economically coerced" into selling his bulk whiskey nor into entering into the transactions covered by the June 20th letter, nor into signing all the writings in July which affirmed and adopted the June 20th letter (F. F. 33, 31, 32, 65a, 64a).

2. Plaintiff repeatedly claims he was "discriminated" against ("Questions Presented" 1, 3) and "overcharged" ("Questions Presented" 5, 1) in the sum of $480,000 (Pet. 2, 3, 12, 14, 15, 19, 22, 23, 26, 27, 28) and that he paid a "higher price" (Pet. 22), and that defendant insisted the

"entire overcharge" be paid "in advance" (Pet. 23). None of these assumptions or conclusions alleged as facts is supported by the credible evidence or by the Findings of Fact of the courts below. They were obviously conceived by plaintiff's lawyers as arguments only when they prepared and filed the complaint in this action on December 28, 1948, more than two years after complete performance, "without objection" (Concl. of Law 4, 67a) of the bulk whiskey transaction. Paragraphs 21 and 22 of Stipulation B of the Stipulation of Facts herein (4da) show that plaintiff did not prior to the filing of the complaint claim in any writing (a) that "he was entitled to receive or that he claimed more" than the $100,257.49 (the O. P. A. price of the bulk) paid by defendant for the bulk whiskey, or (b) that "he had made an advance payment of $481,742.51 in payment for the case goods." Plaintiff's financial statements show that plaintiff, until 1948, considered the $480,000 as an asset (not as an overcharge), and he so entered it on his books of account, along with the value he placed upon similar contracts, under the caption "Distillers contracts" (P. Exs. 43, 45, 47; 138a, 142a, 146a). The courts below found that: (a) "There was no unlawful price discrimination which placed him [plaintiff] at a competitive disadvantage or offended the provisions of the statute" (Op. 46a—see, also, Op. 47a and Concl. of Law 3, 67a); (b) "If anything the plaintiff was given preferred and more favorable treatment during a period of short supply than that accorded by defendant to any of its other distributors who were plaintiff's competitors" (Op. 45-46a; F. F. 34, 65a and D. Exs. M and N-1, N-2, N-3, 82-96da; T. 889, T. 891, 18-19da; 800-1, 13-14da; F. F. 34, 65a).

3. The plaintiff also makes the following statements in his Petition: "In June, 1946, Brown-Forman Distillers

Corporation, a liquor distiller, made an offer to Capitol Wine & Spirit Corp." ("Questions Presented" 6, Pet. 4); "The June 20th letter, the terms of which first became binding on the petitioner on July 17, 1946" (Pet. 9); "There was a clear substitution of plaintiff's performance for Capitol's performance" (Pet. 31); "The Agreement Between Plaintiff and Defendant Resulted from a Novation in July 1946" (Pet. 30); "Prior to July 17, 1946 neither party was bound to the other" (Pet. 33). The proven facts as found by the courts below are that plaintiff (not Capitol) and defendant negotiated with each other (F. F. 13, 14, 15, 51-54a; D. Ex. A, 154a) and reached an "agreement" which was embodied in the June 20th letter (Op. 38a, F. F. 16, 54a). Judge Weinfeld found that, "Neither plaintiff nor defendant expected Capitol as then constituted to have anything to do with the transaction" (Op. 42a). Both parties completely performed the bulk transaction prior to July 17th (F. F. 28, 63a; Op. 40a, 43a) and plaintiff began performing the case goods transaction on July 9th (F. F. 25, 61a). How, then, can plaintiff claim "neither party was bound to the other until July 17th"?

4. Plaintiff claims, "The discrimination in price took the form of a requirement" imposed by defendant that the plaintiff sell his bulk whiskey to defendant "at approximately $100,000" (its O. P. A. price) which was "$480,000 less than its fair market value" (Pet. 6, 7). He claims discrimination because his bulk whiskey had a "true economic value" (Pet. 22) or "economic value" (Pet. 18) of $480,000 more than its June 20, 1946 O. P. A. maximum ceiling price (Pet. 2, 18-19). Judge Weinfeld found—not on what the plaintiff could have done, but on what he did do as established at the trial—that plaintiff "preferred the advantages of the distributorship of the defendant's products and its firm commitment to sell him case goods" (Op.

43a). The purpose of the Emergency Price Control acts was to fix maximum O. P. A. prices of scarce commodities. For defendant now to claim he was entitled to $480,000 alleged "true economic value" in excess of the June 20, 1946 O. P. A. maximum price would, ten years after the event, retroactively do violence to such statute; it would also force upon the defendant a changed and different contract and payment which defendant would not have undertaken if the claim had been made at the time the transactions were negotiated and entered into.

Reasons Why the Petition Should Be Denied.

I.

All three of plaintiff's causes of action described above were properly disposed of by the courts below on determinations of fact, and on nonfederal legal grounds by the correct application of the New York law of Contracts and of the Statute of Frauds to the facts as proved and found.

II.

There is no clear error in the decisions of the courts below such as is required under the "two court rule" to move this Court to exercise its discretion to grant certiorari.

III.

Contrary to what is contended at page 11 and elsewhere in the Petition, no question of far-reaching importance is presented by the decision of the Court of Appeals affirming the District Court. This case arose only because of circumstances peculiar to its own facts, i.e., that price controls temporarily lapsed for 25 days during July, 1946. These circumstances alone enabled the plaintiff, retroactively and 2½ years after the event, to contend that his bulk whiskey, when he delivered his warehouse receipts, had a market or

true economic value of $480,000 more than the O.P.A. maximum ceiling price at which he contracted to sell it as set forth in the June 20, 1946 letter and that defendant should pay him this alleged excess value. As these circumstances, peculiar to this case, will never occur again, this case raises no important question of federal law which is required to be settled by this Court.

Argument.

I. The trial of this case before a judge without a jury lasted eight days, during which time 1,256 pages of testimony were taken and 90 exhibits were introduced. There were sharply contested issues of fact (see, for example, T. 797, T. 798, 13da; T. 654-56, T. 659, T. 664, T. 667, 32-34da; T. 201-204, 27-30da; T. 1156-58, 34-35da; T. 1159, 36da; T. 1172, 36da; T. 1175-76, 36-37da). The pertinent facts proved at the trial are clearly stated in the Findings of Fact which include the facts stated in Judge Weinfeld's Opinion (49a). They are overwhelmingly supported by the undisputed signed writings and the credible evidence adduced at the trial. They can only be set aside "if clearly erroneous." (F. R. C. P. 52(a)). The Findings of Fact included the District Court's Conclusions of Law. The Court of Appeals for the Second Circuit unanimously affirmed on the Opinion below of Judge Weinfeld, the District Judge (Pet. App. 19).

The basic question before the District Court was the interpretation, in the light of surrounding circumstances, contemporaneous writings and complete performance by both parties hereto, as described above, of a written agreement made between them on June 20, 1946. The June 20th letter became the "charter" between the parties (Op. 42a), "effective on both of them as of June 20, 1946" (Concl. of Law 2, 66a). The Emergency Price Control Statutes were effective on that date. Consequently, plaintiff and

defendant could not have legally sold or contracted to sell their bulk or case goods whiskey, respectively, at more than the O.P.A. maximum ceiling price, which was the price specified in the June 20th letter.

The temporary lapse of O. P. A., in the July 1-25, 1946 period, unlike the imposition of a price control or regulatory statute, did not affect or make illegal or unenforceable the June 20th contract. See *Ellis Gray Milling Co.* v. *Sheppard,* 222 S. W. 2d 742, 746 (Mo. 1949).

One of the major issues of law in this case is whether the terms and conditions of the June 20th letter were effective on the parties hereto as of its date as held by the courts below or on July 17, 1946 as claimed by plaintiff. The New York law of contracts and of the statute of frauds, where the contract was to be performed, is determinative of said issue and was correctly applied by the lower courts. The contemporaneous writings signed by and on behalf of the plaintiff, which showed his ratification, adoption, part performance of the case goods transaction, and complete performance of the bulk whiskey transaction, were dated July 2, 5, 9, 10 and 12, 1946 (F. F. 23, 58a; F. F. 24, 60a; F. F. 25, 26, 61a; F. F. 28, 62a; F. F. 28, 63a). These writings, with the June 20th letter, were specifically held to make said June 20th letter the agreement between the parties hereto and effective as of its date (F. F. 31, 32, 64a, 65a; Concl. of Law 2, 66-67a; Op. 41a).

New York law clearly supports the lower courts' decision on this important point. In *Crabtree* v. *Elizabeth Arden Sales Corp.,* 305 N. Y. 48 (1953), it was held at page 55 that the signed and unsigned writings should be read together to establish the contract and satisfy the Statute of Frauds. *Papaioannou* v. *Britz,* 285 App. Div. 596, 600 (1st Dept. 1955), holds that writings signed after the making of the agreement validated the agreement as of its original date, so far as the Statute of Frauds is concerned.

The Federal courts sitting in New York apply this same rule. *U. S.* v. *City of New York*, 131 F. 2d 909, 915 (2d Cir. 1942); *Khan* v. *Leo Feist, Inc.*, 165 F. 2d, 188, 191-192 (2d Cir. 1947) citing 2 Williston on Contracts, Section 590, wherein the general rule is stated (p. 1701) that upon satisfaction of the Statute of Frauds the agreement or contract becomes binding as of its date.

This Court will not disturb the conclusions of law unanimously made by the District Court and the U. S. Court of Appeals based on local New York law, as applied to the facts found, particularly when three out of four of the judges who passed upon the case below were experienced New York lawyers.* In *Bernhardt* v. *Polygraphic Company of America, Inc.*, 350 U. S. 198 (1956) this Court said, at pages 204-205:

> "* * * Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is. See *MacGregor* v. *State Mutual Co.*, 315 U. S. 280; *Hillsborough* v. *Cromwell*, 326 U. S. 620, 630; *Steele* v. *General Mills*, 329 U. S. 433, 439. * * *"

In *General Box Co.* v. *United States*, 351 U. S. 159 (1956), the Court stated at page 165:

> "* * * We ordinarily accept the determinations of the Courts of Appeals on questions of local law,

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* The Hon. J. Edward Lumbard, United States Circuit Judge, is a member of the bar of the State of New York, and was formerly a justice of the Supreme Court of the State of New York and formerly the United States Attorney for the Southern District of New York.

The Hon. Harold R. Medina, United States Circuit Judge, was for many years a professor of law at Columbia; he taught for many years a New York State Bar Examination review course and was an outstanding practising New York lawyer participating, primarily, in trial and appellate court work.

The Hon. Edward Weinfeld, United States District Court Judge, a member of the New York Bar, was for many years a practising lawyer in New York.

> and we do so here. *Ragan* v. *Merchants Transfer Co.*, 337 U. S. 530, 534; *Huddleston* v. *Dwyer*, 322 U. S. 232, 237."

See also *Palmer* v. *Hoffman*, 318 U. S. 109, 118 (1943) and *Francis* v. *Southern Pacific Co.*, 333 U. S. 445, 447 (1948).

Thus that part of the decision below based on the New York law of Contracts and of the Statute of Frauds holding that the June 20th letter was the contract between the parties and effective as of its date and that there was no difference or discrimination in price between what the defendant charged plaintiff for case goods and what it charged other New York wholesalers, is sufficient to dispose of plaintiff's First Cause of Action on nonfederal grounds. As the First and, as will hereafter be seen, the Second and Fourth causes of action were disposed of on an adequate nonfederal ground this Court will not disturb such decision. *Township of Hillsborough* v. *Cromwell*, 326 U. S. 620, 629 (1946). For the same principle, see also *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 2 (1940); *Public Service Commission* v. *Wisconsin Telephone Co.*, 309 U. S. 657 (1940).

II. Under Federal Rule of Civil Procedure 52(a) and the decisions of this Court, the Findings of Fact will not be disturbed unless "clearly erroneous." *McAllister* v. *United States*, 348 U. S. 19, 20 (1954); *U. S.* v. *Oregon State Medical Society*, 343 U. S. 326, 332 (1952).

Actually, plaintiff in his Petition is attempting in this Court to retry and reargue his case *de novo* on the record. This Court will not, in the absence of clear error, reweigh the evidence and review the Findings. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 340 (1949). Judge Weinfeld stated in his Opinion (Op. 41a) that, "When we examine the transaction of June 20, 1946 in its setting it becomes crystal clear what the parties were trying to do." When the Court of Appeals unanimously affirmed on Judge Weinfeld's Opinion, they, too, must have thought the case

"crystal clear." With such unanimous affirmance, this Court will not disturb the decisions of the lower courts under the so-called "two court rule."

A case quite similar in principle to the one at bar, in that interpretation and legality of a contract were involved, as well as the "two court rule," is *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3 (1936). In that case, petitioner challenged the validity under §3 of the Clayton Act (15 U. S. C. A. 14) of a provision of the contracts made with the dealers by the selling organizations of General Motors. This Court stated, in part, in a *per curiam* opinion at page 4:

> "* * * Upon the evidence adduced at the trial the District Court found that the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce. This finding was sustained by the Circuit Court of Appeals. *Id.* [80 F. (2d) 641], p. 644.
>
> "Under the established rule, this Court accepts the findings in which two courts concur unless clear error is shown. *Stuart* v. *Hayden*, 169 U. S. 1, 14; *Texas & Pacific Ry. Co.* v. *Railroad Commission*, 232 U. S. 338; *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 558; *United States* v. *Commercial Credit Co.*, 286 U. S. 63, 67; *Continental Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 678. Applying this rule, the decree is *"Affirmed."*

This doctrine was adhered to in *Graver Manufacturing Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949), and reiterated upon rehearing, 339 U. S. 605, 612 (1950).

Finally, it is submitted, the plaintiff has not in his Petition brought himself within the "character of reasons which will be considered" by this Court in governing review on certiorari (Supreme Court Rule 19).

The plaintiff attempts to avoid the effect of the foregoing controlling authorities with respect to the exercise

by this Court of its discretion in granting review on certiorari by citing the following cases:

Plaintiff cites (Pet. 16) *United States* v. *U. S. Gypsum*, 333 U. S. 364, 395-396 (1948). That was a Section 1 and 2 Sherman Act case involving conspiracy, restraint of trade and patent license agreements. Appeal was directly to this Court from a District Court sitting with three judges. The so-called "two court rule" did not apply in that case.

Plaintiff cites (Pet. 16) *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U. S. 147, at page 153 (1950). There this Court said, "The facts are little in dispute" (p. 153), and the reason this Court reversed the lower court was because "a standard of invention appears to have been used that is less exacting than that required where a combination is made up entirely of old components." (p. 154). This would seem to have no application to the case at bar.

Plaintiff cites (Pet. 20) *Mahnich* v. *Southern Steamship Co.*. 321 U. S. 96, at pages 98, 99 (1943). That case was one in admiralty where the lower courts, believing they were, as a matter of law, bound by a decision of the U. S. Supreme Court, held a vessel unseaworthy as a matter of law. There was, thus, a misunderstanding of a prior decision of this Court on a question fundamental to practically every case in admiralty.

The plaintiff cites (Pet. 21) *Baumgartner* v. *United States*, 322 U. S. 665 at 671 (1944). That case was brought to this Court because "important issues in the proper administration of the law affecting naturalized citizens" (p. 666) were involved, as well as the "duties and immunities of citizenship" (p. 671). How different this is from the case at bar involving issues of fact and New York law relating to a common commercial transaction.

Plaintiff asks this Court to review the lower courts' holding that the bulk whiskey and case goods transactions

were separate and that the claimed $480,000 excess value of the bulk could not be added to the price of the case goods ("Questions Presented" 4, Pet. 3, 20-27). Plaintiff contends the lower courts erred because the June 20th letter contained "no provision for severing the two sales" (Pet. 3, 20).

It is respectfully submitted that the lower courts' Findings of Fact (Op. 44-45a) and Law (Op. 46-47a) that the bulk and case goods transactions were separate, are not subject to review under the authorities cited above relating to the "two court rule"; and, in any event, the decisions of the lower courts were correct. Not only does the June 20th letter show how detailed, different and separate the bulk and case goods transactions were (see paragraphs 4-9 thereof), but the bulk transaction was to be and was in fact completed promptly. The price of the bulk was the "applicable O.P.A. maximum ceiling price," there were no qualifications as to price similar to those applied to the case goods which was to be delivered over a two and one-half year period.

Obviously the separate bulk whiskey transaction, promptly, completely and voluntarily performed by plaintiff, cannot now be used by him to color, affect or increase the price of the cases of whiskey involved in the transaction relating to the sale and delivery of the case goods to him over a subsequent two and one-half year period.

Plaintiff claims (Pet. 24-25) that the case of *United States* v. *Henry Drew & Company,* 172 F. 2d 555 (6th Cir. 1949) does not support the proposition for which the lower courts cited it (Op. 46a). Defendant believes the *Drew* case establishes that the alleged market value or "true economic value" of the bulk whiskey cannot be construed or considered as part of the consideration or price plaintiff paid for the case goods. That case involved the purchase and sale of bulk whiskey in early July of 1946, at less than its market value, which was part of an agreement to sell

and deliver case goods over a twelve month period at O. P. A. ceiling prices. The question was whether, under the Price Control Act, the price of the case goods included the loss the purchaser of the case goods sustained in selling the bulk at less than its value. The Court of Appeals rejected the Government's contention that the price of the case goods was increased by the amount of the loss on the bulk. On exactly the same theory plaintiff here advances with respect to the claimed overpayment on the case goods sold him, the Government in the *Drew* case contended on page 5 of its brief in the Court of Appeals, that Drew had violated the Price Control Statutes and regulations, viz.:

> "Briefly stated, our position is that in connection with the sale of the whiskey here involved appellee [Drew] received the amount paid by its customers [retailers] at the time of delivery [of the case goods] plus the amount paid in connection with the warehouse receipts transactions. As a matter of common sense and practicality, there can be no question that the bottled whiskey cost the customers the amount they paid in connection with the purchase and sale of the warehouse receipts plus what they paid appellee [Drew] when the bottled whiskey was delivered."

The Court in the *Drew* case stated its conclusion as follows at page 556 of its opinion:

> "* * * The transactions during the hiatus period by which the appellee [Drew] acquired the whiskey [bulk], which he resold, had been fully consummated as separate transactions and the sales and deliveries of the extra allotment of case whiskey which appellee received from the distillery and sold to his participating customers at O. P. A. ceiling prices in accordance with his agreement cannot, in our judgment, be properly tied in with his transactions concerning the warehouse receipts. This being true, inasmuch as he [Drew] sold to his participating customers liquor delivered at lawful prices after the reenactment of

> the Emergency Price Control Act on July 25, 1946, he has not violated the law."

Thus, the $4 per gallon loss sustained by the retailers in connection with their sale of warehouse receipts to Drew was held not to be part of the price of the case goods later sold by Drew to those retailers. In both the *Drew* case and the case at bar, the purchaser of the case goods sustained a claimed loss on the sale of the bulk whiskey. In both cases, the determinative question is what constituted the "price" at which the case goods were sold, which in turn depended upon whether the bulk and case goods transactions were one or separate. The decision in the *Drew* case clearly established that the bulk and case goods sales were separate transactions and hence the alleged loss on the bulk whiskey could not be added to the billed price of the case goods to determine the "price" of the case goods under O. P. A. In the light of the facts in the *Drew* case, its decision is equally applicable in determining here that the alleged loss on the sale of the bulk was not part of the "price" of the case goods under the Robinson-Patman Act.

Gaddy v. *Silverman et al.*, 71 S. E. 2d 277 (Ga. App. 1952) is to the same effect as the Drew decision. See also *De Waal* v. *Jamison*, 176 App. Div. 756 (1st Dept. 1917), aff'd, no opinion, 226 N. Y. 644, on the question of separate transactions.

III. It is inconceivable that this Court would seriously entertain the proposition that when two parties enter into simultaneous transactions they do so at the risk that the supposed loss of one party in one transaction may be used to affect the price of the other transaction and subject the other party to a treble damage action under the Robinson-Patman Act years after the transactions were performed. Such a decision would seriously upset the entire economy. It would, for example, prevent the customary and necessary practice of corporations making, at the same time,

various transactions, contracts and subcontracts, which are so necessary to the expeditious handling of government defense requirements.

Despite the lower courts' holdings that plaintiff was not discriminated against (Op. 46a) but that he was preferred (Op. 45a), plaintiff claims he was discriminated against indirectly by terms of sale (Pet. 11-19). In view of the aforesaid findings, the allegedly important question (Pet. 11-12) is hypothetical and moot. Furthermore, the only case plaintiff cites in support of this contention and that a question of far-reaching importance is presented by the decision of the Court of Appeals (Pet. 11-19) is *Corn Products Ref. Co.* v. *Federal Trade Commission,* 324 U. S. 726, at pages 732 and 740 (1945) (Pet. 13, 19). That case was brought by the Federal Trade Commission, not by a private individual for treble damages. It was primarily a so-called "basing point" case involving freight differentials and phantom freight, as well as certain other practices, such as booking and advertising allowances, none of which is involved in or applicable to the case at bar.

The Second Cause of Action:

Plaintiff claims ("Questions Presented" 7, Pet. 5, 10-11, 35-36) that the lower courts should have taken judicial notice "that a purchaser buys wherever it is cheaper for him to buy" (Pet. 36) and "that such sales at lower prices to monopoly states [Pennsylvania and Ohio] adversely affected the petitioner" (Pet. 11). The lower courts found that plaintiff had "utterly failed to establish either damage or likelihood of damage," or that the sales to monopoly states "affected him adversely" (Op. 48a) or that he was in competition with the Pennsylvania and Ohio State Liquor Authorities (F. F. 36, 66a; Concl. of Law 5, 67a) and that such sales by the defendant "did not tend to

lessen competition or tend to create a monopoly" (Concl. of Law 6, 68a). The defendant, having failed to prove the facts and elements necessary to establish a violation of Section 2(a) of the Robinson-Patman Act (15 U. S. C. A. 13(a)), now tries to cure such failure by claiming that the lower court should have taken "judicial notice" of these necessary facts and elements. The two cases cited by plaintiff (Pet. 36), *United States* v. *Rumely*, 345 U. S. 41 at page 44 (1953) and *United States* v. *Reynolds*, 345 U. S. 1, at page 10 (1953), hold that a court may take judicial notice of national issues. A court will not and should not, however, take judicial notice of facts and elements a plaintiff must prove to establish a cause of action.

The Fourth Cause of Action:

Plaintiff again contends, contrary to the findings of the courts below, that defendant required plaintiff to sell his bulk whiskey to it and that he was discriminated against ("Questions Presented" 8, Pet. 5, 36) in violation of Section 101-b of the New York Alcoholic Beverage Control Law (3 McKinney's Consolidated Laws §101-b), herein referred to as the "ABC law." The courts below found that as there was no price discrimination, plaintiff "failed to establish a violation of the New York statute" (Op. 47a, Concl. of Law 8, 68a). The lower courts did not, therefore, pass on the question of whether a private person has a cause of action for damages under §101-b of the ABC law (Op. 47a). Plaintiff, nevertheless, contends that the courts below decided an important question of state law contrary to the decision of this Court and of the New York Court of Appeals (Pet. 37). This is not so.

Plaintiff cites (Pet. 37) in support of its contention two cases, viz., *Texas & Pacific Railway Co.* v. *Rigsby*, 241 U. S. 33 (1916) and *Filardo* v. *Foley Bros., Inc.*, 297 N. Y. 217 (1948), reversed on other grounds, *Foley Bros. Inc.* v.

Filardo, 336 U. S. 281 (1949). Neither of these cases involves a public policy, police power or licensing statute, which is what the New York ABC law is (see ABC law §§2 and 101-b). The distinction between Liquor and Health and Safety Statutes is set forth in 3 Sutherland *Statutory Construction,* §7203 particularly at page 406, and §7204 particularly at page 416.

The provisions of the ABC law are enforced by the State Liquor Authority, not by private individuals (ABC law, §§2, 10 and 17; see also §§123, 124 and 130). *In re Bay Ridge Inn,* 94 F. 2d 555, 557 (2d Cir. 1938); *Calvary Presbyterian Church* v. *State Liquor Authority,* 245 App. Div. 176, 178 (4th Dept. 1935), affirmed 270 N. Y. 497. The principle defendant is emphasizing is aptly stated in *Consolidated Freightways, Inc.* v. *United Truck Lines, Inc.,* 216 F. 2d 543, 547 (9th Cir. 1954), cert. denied 349 U. S. 905 (1955).

As no New York state court nor the courts below have construed the New York ABC law §101-b.2(a) as plaintiff requests, giving an individual a cause of action for damages for violation thereof, this Court will not grant certiorari to raise such question *de novo.*

Conclusion.

For the reasons stated the Petition for certiorari should be denied.

Respectfully submitted,

THOMAS KIERNAN,
Attorney for Respondent.

WHITE & CASE,
ERNEST A. FINTEL,
Of Counsel.

Dated: New York, N. Y.
October 19, 1956.

OCT 3 1 1956

JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 452

JOSEPH SACHS, doing business as ATLANTIC LIQUOR WHOLESALERS,

Petitioner,

—against—

BROWN-FORMAN DISTILLERS CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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POINT I

The Robinson-Patman Act would be virtually emasculated if the seller were permitted, in lieu of demanding and receiving a higher dollar price for a certain commodity, to receive additional consideration in some form other than dollars.

One fact clearly emerges from the respondent's brief, i. e., *the defendant refused to sell plaintiff its case goods whiskey at its regular prices unless it received plaintiff's bulk whiskey at one-sixth of its market value.*

There is much argument in respondent's brief (p. 5) purporting to show that the plaintiff initiated

the negotiations with defendant, that he voluntarily delivered to defendant his warehouse receipts for bulk whiskey, that he was not under economic restraint when he elected to adopt the agreement, and that he was not economically coerced into selling his whiskey. In effect, all that the respondent says in its brief is that the plaintiff voluntarily entered into the transaction.

Defendant is attempting to negate the fact that plaintiff was *required* to sell his bulk whiskey to defendant at one-sixth of its market value *as a condition* for obtaining its case goods whiskey at regular prices, by pointing to the finding that plaintiff *voluntarily* entered into the transaction.

In virtually every case of a violation of the Robinson-Patman Act the offended party has *voluntarily* paid the illegal higher price.

The plaintiff's position, however, is not that he entered into the transaction involuntarily, but that the defendant refused to sell him case goods whiskey unless the plaintiff agreed to sell his bulk whiskey as above set forth, thus in effect paying for defendant's case goods $480,000 more than the price paid by plaintiff's competitors, defendant's other New York customers. *This additional consideration amounted to a 15% overcharge in the price of the case goods.*

The Federal Trade Commission has frowned upon a price discrimination of 3%—see *Matter of Standard Oil Co.*, 41 F. T. C. 263 (1945).

The defendant does not establish, as it cannot, that it was willing to sell its case goods whiskey to the

plaintiff at its regular prices without requiring the plantiff to sell bulk whiskey to it at one-sixth of its market value.

All of the evidence is to the contrary (Petition, pp. 6, 7, 22, 23, 24, 26, 27). The very wording of the June 20, 1946 letter, appended hereto (Plaintiff's Exhibit 1, 127-9a), which the District Court stated (Op. 11 App.) "became the charter by which their dealings were governed," is complete proof of the defendant's insistence on the sale of bulk whiskey and the inseparability of the bulk whiskey and the case goods transaction. Had the sale of such bulk whiskey not been required, and had the transactions been separable, it is clear beyond cavil that the plaintiff would not have sold the bulk whiskey at one-sixth of its fair market value.

The defendant's position evidently is that the Robinson-Patman Act affords relief to purchasers who have been discriminated against only if they purchased involuntarily. The Act (15 USC § 13(a), page 1 of the Appendix to the Petition), provides:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either *directly* or *indirectly,* to discriminate in price between different purchasers of commodities of like grade and quality * * *" (Italics ours.)

There is no provision in the Act that it is lawful to discriminate in price between different purchasers of commodities if one of the purchasers voluntarily pays the higher price. Nor is it material that the added consideration be in the form of something other than a monetary differential.

If this Court permits the decision of the courts below to stand, it points the way to a legal device to avoid the Robinson-Patman Act, since any seller could discriminate in price by requiring a prospective purchaser, in order to obtain its goods at regular prices, to pay it some added consideration other than cash. We do not believe that such a course is consistent with the spirit or purpose of the Robinson-Patman Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, N. Y.
October 29, 1956.

SYDNEY KRAUSE
Counsel for Petitioner

KRAUSE, HIRSCH & HEILPERN
CHARLES SINGER
Of Counsel

Plaintiff's Exhibit 1 (appearing in Appendix at pages 127-9a)

June 20, 1946.

Capitol Wine and Spirit Corp.
385 Gerard Avenue
Bronx, New York

Dears Sirs:

This letter will confirm an agreement this day made between your Company and our Company.

You will sell to us and we will buy from you 1,200 barrels of 1941 and 1942 bulk whisky of the following inspections:

75 barrels of 1941 Clifton Springs Bourbon
75 barrels of 1941 Cummins Bourbon
430 barrels of 1941 Old Heaven Hill Bourbon (excluding April and May, 1941 inspections), and
620 barrels of 1942 Old Heaven Hill Bourbon.

The price to be paid is the applicable OPA maximum ceiling price. Payment will be made by us against sight draft drawn on us, payable at the First National Bank of Louisville, with warehouse receipts attached, properly endorsed.

We hereby agree to deliver to you the following quantities of case goods:

(a) During the two year period beginning July, 1946, and ending June, 1948, 10,536 cases of OLD FORESTER Bottled-in-Bond, in equal monthly shipments of 439 cases per month, and 96,984 cases of BROWN-FORMAN'S KING, BLACK

LABEL, Blended Whisky, in equal monthly shipments of 4,041 cases per month, and

(b) During the six months' period beginning July, 1948, and ending December, 1948, 2,634 cases of OLD FORESTER Bottled-in-Bond, in equal monthly shipments of 439 cases per month, and 9,852 cases of BROWN-FORMAN'S KING, BLACK LABEL, Blended Whiskey, in equal monthly shipments of 1,642 cases per month.

During the period of existence of the Office of Price Administration, the prices to be paid for the case goods delivered during such period shall be the applicable maximum OPA ceiling prices to wholesalers.

After the prices to be paid for the case goods are no longer subject to Government regulation, the prices to be paid for the case goods delivered thereafter shall be Brown-Forman's lowest f.o.b. prices to similar wholesalers in effect from time to time. Payment shall be on the basis of Brown-Forman's usual terms.

You are to have the right to distribute the case goods sold to you in the Metropolitan area of New York City and in the generally accepted liquor distribution territory of Newburgh, New York.

We are not to be responsible or liable for failure to deliver the foregoing case goods, in accordance with the schedules hereinbefore mentioned, because of strikes, lockout, labor troubles, expropriation of plant by Governmental authority, further restriction of production beyond that in effect during the month of June, 1946, or other causes beyond our control.

In the event of a delay in deliveries due to any of the foregoing causes, the deficiency in shipments shall be

made up as soon as the cause or causes therefor no longer exist.

The undertakings and privileges hereunder shall inure to the benefit of and be binding upon the successors and assigns of your Company as well as ours; provided, however, that any assignee of your Company shall be a duly licensed liquor wholesaler and shall be satisfactory to us.

Very truly yours,

BROWN-FORMAN DISTILLERS CORPORATION

JOHN B. LAPPIN
Vice President

JBL:ew